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APPENDIX

Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

No. [redacted] 40

JAMES CONWAY,

Petitioner,

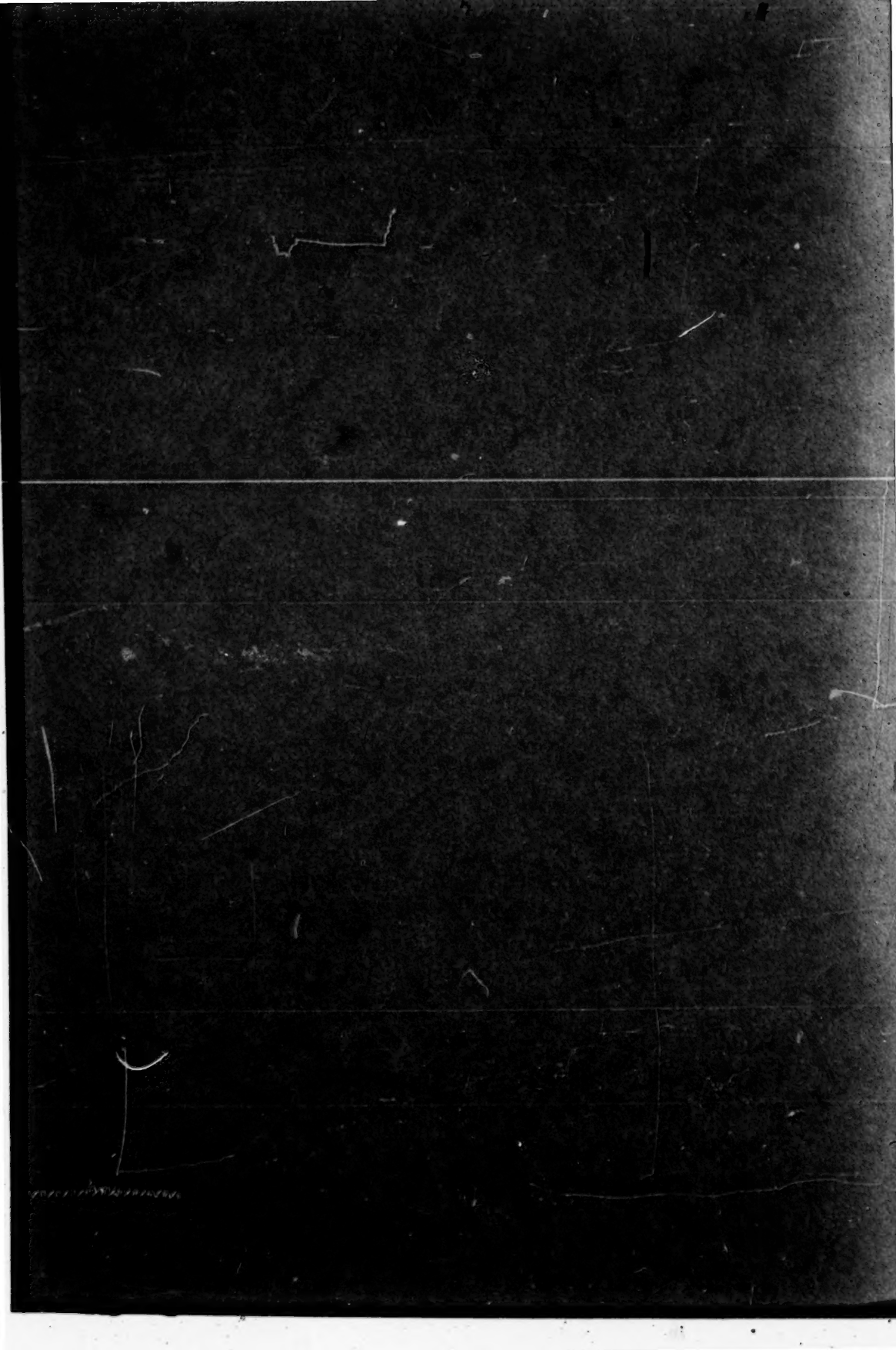
—v.—

CALIFORNIA ADULT AUTHORITY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 6, 1968

CERTIORARI GRANTED JANUARY 27, 1969



Supreme Court of the United States

OCTOBER TERM, 1968

No. 974

JAMES CONWAY,

Petitioner,

—v.—

CALIFORNIA ADULT AUTHORITY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Case No. 47725

JAMES CONWAY

v.

CALIF. ADULT AUTHORITY

DOCKET ENTRIES

DATE 1967		FILINGS—PROCEEDINGS
Aug.	25	Petitioner allowed to file his pet. for writ of habeas corpus in forma pauperis. Harris
		1. Petition for writ of habeas corpus.
		2. Order denying petition with leave to amend. Harris Copies to AG and Pet.
Sep.	8	3. Filed petnr's. "Motion for hearing". (File to GBH)
	27	4. Filed order denying appli. for writ of hab. corp. (Harris)
		Copies mailed to petnr. & A.G.
Oct.	10	5. Filed pltfs. petition for certificate of probable cause (File to GBH)
	31	6. Filed order denying petn. for a cert. of prob. cause. (Harris)
		Copies mailed to petnr. & A.G.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

47725

Filed August 25, 1967, James P. Welsh, Clerk

Received August 22, 1967,
Clerk, U. S. District Court, San Francisco

[Title Omitted in Printing]

PETITION FOR WRIT OF HABEAS CORPUS
PERSONS IN STATE CUSTODY

* * * * *

1. Place of detention CALIFORNIA STATE PRISON, REPRESA, CALIF.
2. Name and location of court which imposed sentence SUPERIOR COURT, STATE OF CALIFORNIA, KERN COUNTY
3. The case number (if known) upon which, and the offense or offenses, for which sentence was imposed:
   (a) 6494 and 6498
   (b) .....
   (c) .....
4. The date upon which sentence was imposed and the terms of the sentence:
   (a) MARCH 10, 1952—5 YEARS TO LIFE FOR TWO COUNTS OF ROBBERY,
   (b) CONSECUTIVELY
   (c) .....
5. Check whether a finding of guilty was made:
   (a) after a plea of guilty .....
   (b) after a plea of not guilty NOT GUILTY
   (c) after a plea of nolo contendere .....

6. If you were found guilty after a plea of not guilty, check whether that finding was made by:

   (a) a jury A JURY

   (b) a judge without jury .....

7. Did you appeal from the judgment of conviction or the imposition of sentence: NO.

8. If you answered "yes" to (7), list:

   (a) the name of each court to which you appealed:

   I. .....

   II. .....

   III. .....

   (b) the results in each such court to which you appealed:

   I. .....

   II. .....

   III. .....

   (c) the date of each such result:

   I. .....

   II. .....

   III. .....

   (d) if known, citations of any written opinion or orders entered pursuant to such results:

   I. .....

   II. .....

   III. .....

9. If you answered "no" to (7), state reasons for not so appealing:

   (a) I DID NOT APPEAL BECAUSE I DID NOT KNOW HOW

   (b) .....

   (c) .....

10. State concisely the grounds on which you base your allegations that you are being held in custody unlawfully:

(a) THE INDETERMINATE SENTENCE LAW IS SO VAGUE THAT A PERSON OF ORDINARY INTELLIGENCE CAN NOT UNDERSTAND WHAT IT REQUIRES.

(b) IT IS A VIOLATION OF PETITIONER'S CONSTITUTIONAL RIGHT FOR THE ADULT AUTHORITY TO REVOKE THE TERMS OF HIS SENTENCE AFTER IT WAS PARTLY SERVED

(c) CALIFORNIA PENAL CODE § 3063 PROHIBITING THE REVOKING OF PAROLES WITHOUT CAUSE, MUST ALSO BE APPLIED IN CASES OF REVOKING TERMS AND PAROLES ALIKE WHEN BOTH ARE DONE WITHOUT CAUSE.

(d) .....

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) THERE WERE THREE INDETERMINATE SENTENCES (SEE ATTACHED POINTS AND AUTHORITIES). AND THE LAST ONE (STATS., 1941, CH. 106) IS NOT THE SAME AS THE ONE OF 1917 WHICH WAS RIGHTLY DECLARED CONSTITUTIONAL.

(b) IT IS DOUBLE PUNISHMENT FOR THE ADULT AUTHORITY TO REVOKE AND INCREASE ANY TERM PARTLY SERVED.

(c) IF CALIFORNIA PENAL CODE § 8063 PROTECTS PRISONERS AGAINST HAVING THEIR PAROLES REVOKED WITHOUT CAUSE: IT IS UNCONSTITUTIONAL FOR IT NOT TO PROTECT AGAINST REVOKING THE TERM ALSO.

12. Prior to this petition have you filed or submitted with respect to this conviction:

(a) Any petition in a State Court for relief from this conviction?

.....

.....

.....

.....

(b) any petition in State or Federal Courts for habeas corpus?

.....

(c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)?
YES

(d) YES

12a. Include, if available, copies of the petitions described in (12).

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

I. PETITION FOR HABEAS CORPUS
II. APPEAL
III. HABEAS CORPUS—HABEAS CORPUS
IV. CERTIORARI—CERTIORARI

(b) the name and location of the court in which each was filed or submitted:

I. SUPERIOR COURT, SOLANO COUNTY, No. 4222
II. DIST. COURT OF APPEAL, FIRST DIST. No. 4437
III. CALIF. SUPREME COURT, NO. 9495-CALIF. SUPREME COURT, NO. 10307
IV. U.S. SUPREME COURT, NO. 1045-U.S. SUPREME COURT, NO. 1036

(c) the disposition thereof:

I. DENIED
II. DISMISSED
III. DENIED—DENIED
IV. DENIED—DENIED

(d) the date of such disposition:

I. MAY 3, 1963
II. SEPTEMBER 18, 1963,
III. NOVEMBER 3, 1965 & OCTOBER 14, 1966,
IV. APRIL OF 1966 & FEBRUARY 13, 1967.

(e) if known, citations of any written opinions or orders entered pursuant to each disposition:

I. NO OPINION
II. DISMISSED PURSUANT TO CAL. PENAL CODE, SEC. 1506
III. NO OPINION—NO OPINION
IV. NO OPINION—NO OPINION

14. Has any ground set forth in (10) been previously presented to this or any other court, state or federal, in any petition, motion or application which you have filed? YES

15. If you answered "yes" to (14), identify

(a) which grounds have been previously presented:

I. SEE, NO. 13
II. .....
III. .....

(b) the proceedings in which each ground was raised:

I. .....
II. .....
III. .....

16. If any ground set forth in (10) has not previously been presented to any court, state or federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) .....
(b) .....
(c) .....

17. Were you represented by an attorney at any time during the course of

(a) your arraignment and plea? NO
(b) your trial, if any? NO
(c) your sentencing? NO
(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? NO
(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? NO

18. If you answered "yes" to one or more parts of (17), list

(a) the name and address of each attorney who represented you:

I. .....
.....
II. .....
.....
III. .....
.....

(b) the proceedings at which each such attorney represented you:

I. .....
II. .....
III. .....

19. If you are seeking leave to proceed *in forma pauperis*, have you completed the sworn affidavit setting forth the required information (see instructions, page 1 of this form)? YES

[Jurat and Affidavit of Poverty Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

[Title Omitted in Printing]

PETITION FOR WRIT OF HABEAS CORPUS—April 27, 1967

TO: THE HONORABLE PRESIDING JUDGE IN THE ABOVE ENTITLED COURT AND TO THE RESPONDENTS ABOVE NAMED.

GREETINGS:

You will please take notice that JAME CONWAY, the petitioner, complains of the respondents above named and for claim, alleges that: they are holding him in prison contrary to his Constitutional rights; because there were three Indeterminate Sentence Laws between 1917 and 1941; and the present one (1941, Stats. Ch. 106) is so vague and uncertain that it can not be understood by any person of ordinary intelligence.

JURISDICTION

The United States District Court for the Eastern Division of California, may issue writs of habeas corpus; and it is required by statutes to determine when any person within its jurisdiction is deprived of his liberty contrary to the Constitution or Laws of the United States. [28 U.S.C. 2241 (a), (c), (3)].

STATEMENT OF THE CASE

A. *Proceedings In State Courts.*

On March 5, 1952, petitioner was convicted in the Superior Court of Kern County of two counts of first degree robbery in violation of California Penal Code, Section 211; and thereafter, on March 10, 1952, was sentenced to the State Prison for the "term prescribed by law," and it was ordered that the terms of sentence for both conviction be served consecutively with respect to each other.

On March 14, 1952, petitioner was committed to the Adult Authority in the State Penitentiary and he has, ever since that date, been confined in prison and not permitted to go outside of the prison walls either on discharge, or parole, or otherwise.

Approximately eighteen months after petitioner commenced to serve the sentences, he appeared before the Adult Authority (Prison Board) for parole consideration. The Adult Authority denied parole and postponed petitioner for further consideration in one year. And thereafter, petitioner appeared before the Adult Authority each year, and parole was continuouly denied until January of 1959.

On January 29, 1959, petitioner appeared before the Adult Authority for parole consideration, and the Adult Authority did fix petitioner's prison terms at five (5) years each on both counts of the said robbery convictions and each count was to be served consecutively with respect to each other. Parole was denied, and further consideration was postponed to January of 1960; at which time parole was again denied, and petitioner did not thereafter appear before the Adult Authority for parole consideration until June of 1961.

On June 15, 1961, petitioner appeared before the Adult Authority for further parole consideration, and he did discuss parole plans with Mr. Oscar J. Jahnson and Mr. James G. Hutton (Board Members and Representatives, respectively). These gentlemen informed petitioner that the Adult Authority was agreeable to releasing him on parole, but due to the fact that the terms fixed in January 29, 1959, would expire on March 14, 1962, the Adult Authority wished to make a nunc pro tunc order extending petitioner's discharge date beyond March 14, 1962; and the Board Members named above, did urge petitioner to suggest what increase should be made. Petitioner urged that on March 14, 1962, he would have served the 10 years theretofore set by the said Board, and he was entitled to be discharged rather than paroled. And petitioner did not suggest or concent to any increase in his prison term. Nevertheless, the Adult Authority did rescind the action of January 29, 1959, fixing the duration

of petitioner's imprisonment at an aggreate of 10 years. No new duration was fixed by the Adult Authority for the expiration of the said two consecutive sentences, and it was ordered that petitioner appear before the Adult Authority in May of 1962.

On May 28, 1962, the Adult Authority summoned petitioner to appear before them for further parole consideration; but petitioner refused to appear because the terms of 5 years and 5 years consecutively, on both reobbery counts, as fixed on January 29, 1959, had already expired, and the lawful terms of the imprisonment had ended.

On May 3, 1963, petitioner filed an application for a writ of habeas corpus in the Superior Court of the State of California, in and for the County of Solano, entitled: JAMES CONWAY v. CALIFORNIA ADULT AUTHORITY, No. 4222. He alleged that his continued detention was unlawful because he had served and completed one of the two consecutive sentences before the nunc pro tunc order of June 15, 1961. The application was denied without a hearing by the Honorable Thomas N. Healy on May 3, 1963. As a reason for denying the writ, Judge Healy said:

> "No showing of impropriety in determination or redetermination by Adult Authority."

And, upon the County Clerk's own initiative, without a request being made by petitioner, a transcript on appeal was sent to the District Court of Appeal of the State of California, for the First District. This appeal was dismissed without a hearing by the Honorable Justice, Bray of the District Court of Appeals, who said:

> "The appeal herein having been taken from a none-appealable order, the appeal is dismissed on the court's own motion."[2]

A certified copy of the Clerk's Transcript on Appeal (Case No. 4222) with the Order of the Appellate Court (Crim. No. 4437) is marked EXHIBIT "A", attached to the original petition for a Writ of Habeas Corpus herein, and is by reference made a part thereof.

On September 18, 1965, petitioner filed a petition for Writ of Habeas Corpus in the California Supreme Court, entitled JAMES CONWAY v. CALIFORNIA ADULT AUTHORITY, Crim. No. 9495. He urged therein that the Indeterminate Sentence Law is unconstitutional because:

(1) It is an encroachment by the Legislative and Executive branch upon the Judiciary.

(2) It is so vague and uncertain that petitioner can not determine what duration of punishment he had imposed upon him; and the Adult Authority took advantage of its loose definition to coerce petitioner and make him weak and submissive.

Without a hearing, without calling upon respondents to reply, and without giving petitioner an opportunity to prove his claim, the petition was denied by the Supreme Court of the State of California. (A certified copy of this petition is marked EXHIBIT "B", attached to the original petition for a writ of Habeas Corpus herein, and is by referance made a part hereof.)

B. *Proceedings In The Federal Court.*

On December 21, 1965, petitioner filed an application for a Writ of Certiorari to review the California Supreme Court's order of denial in the foregoing habeas corpus action, and to determine the propriety of the California Legislature to enact the Indeterminate sentence law.

In his application for a Writ of Certiorari, petitioner urged that if the Adult Authority were not required to set definite durations of punishment between the maximum and minimum provided by law, and may turn the duration on and off (for any reason whatever) a judgment of imprisonment under provisions of the Indeterminate sentence law is vague and uncertain, and can not servive the Constitutional test for due process of law under the 14th Amentment. (A copy of the application for certiorari, Misc. 1045, is marked EXHIBIT "C", attached to the original petition for Writ of Habeas Corpus, and is by reference made a part hereof).

The United States Supreme Court requested a reply from respondents, which was complied with on March 8, 1966. In response, the Attorney General of California said:

(1) "Since the establishment of the Indterminate Sentence Law in 1917 . . . the maximum term of sentence for first degree robbery has been life." (RSP. 3: 10-13);

(2) ". . . California law neither requires that the Adult Authority in fact fix a term of imprisonment less than the maximum provided for by law, nor does it prohibit the Adult Authority from redetermining or re-fixing a term already set by it. Cal. Pen. Code, §.3020; *Ex Parte McLain*, 55 Cal. 2d 78, 357 P. 2d 1080 (1961), Appeal dismissed, cert. denied, 368 U.S. 10 (1961)." RSP., 4: 7-13;

(3) "Since the Adult Authority has power to set and redetermine sentences within the minimum and maximum limits decreed by law to which the judgment of sentence refers, it may properly refix and thus lengthen a term of imprisonment beyond that originally and necessarily only tentatively fixed. See, *Ex Parte Smith*, 33 Cal. 2d 797, 205 P. 2d 662. (1949)." consecutive sentences may be deemed satisfied until RSP. 4: 14-20:

(4) ". . . Under the law of this state, no one of either the whole of the aggregate term has been served or the maximum term of the initial commitment has expired. See, *In re Cowan*, 27 Cal. 2d 637, 166 P. 2d 279 (1946), cert. denied, 329 U.S. 742 (1946); *In re Byrnes*, 32 Cal. 2d 843, 198 P. 2d 865 (1948); 19 Ops. Cal. Atty. Gen. 23 (1952)." RSP 4: 25-31;

(5) "Since petitioner was properly sentenced to consecutive sentences which in legal effect amounted to separate life terms, the Adult Authority acted within its proper scope when it refixed each of petitioner's terms after the expiration of only seven years." (RSP, 5: 1-5;

(6) and, "California's indeterminate sentence law has been held valid by California Courts in the face of arguments that they were void for uncertainty, *In re Larson*, 44 Cal. 2d 642, 283 P. 2d 1043 (1955), appeal dismissed, 350 U.S. 928 (1956); that they unlawfully conferred the power of courts upon the Adult Authority, *People* v. *Leiva*, 134 Cal. App. 2d 100, 103, 285 P. 2d 46, 49 (1955); *People* v. *Kostal*, 159 Cal. App. 2d 444, 451-53, 323 P. 2d 1020, 1025-26; and that they violated due process and the equal protection clauses of the Federal Constitution. *Fleischer* v. *Adult Authority*, 202 Cal. App. 2d Cal. App. 2d 44, 20 Cal. Reptr. 603 (1962); *People* v. *Kostal*, 150 Cal. App. 2d 444, 323 P.2d 1020 (1958). Contentions similar to those made by petitioner here have been rejected upon the recognition that the questions raised were purely of a local nature involving the interpretation of a state sentencing statute and consequently not a federal question. See, *In re Costello*, 262 f. 2d 214 (9th Cir., 1959). Moreover, Indeterminate Sentence Laws similar to California's have been recognized as valid by this Court. *Wreyer* v. *Illinois*, 187 U.S. 71 (1902); *Ughbanks* v. *Armstrong*, 208 U.S. 481 (1908)"

Petitioner replied to these contentions on March 10, 1966, and April 27, 1966, but to no avail. The United States Supreme Court denied certiorari without a hearing on May 16, 1966.

C. *Proceedings in State Court*

On August 31, 1966, petitioner filed a new petition for a writ of habeas corpus in the California Supreme Court. He urged therein that he is unlawfully restrained of his liberty because:

(1) "The Adult Authority rescinded the order of January 29, 1959 (fixing the terms at 10 years) for no cause". (Tr. of R. No. 10). Without a hearing, without calling upon respondents to reply, and without giving petitioner an opportunity to prove his claim, the petition was denied

by the Supreme Court of California. (A certified copy of this petition for writ of habeas corpus, and other denying the writ, and notice of appeal is marked "EXHIBIT D", attached to the original petition for writ of habeas corpus herein, and is by reference made a part hereof.)

D. *Proceedings in Federal Court*

On November 28, 1966, petitioner filed an application for a writ of certiorari in the Supreme Court of the United Stated to review the order of the California Supreme Court, denying the foregoing petition for writ of habeas corpus. He urged in this application that he was denied due process and equal protection of the laws by the California Supreme Court's denial of his petition for writ of habeas corpus because the acts he stated were the same as had theretofore been tendered to the California Third Appellate Court and the California Supreme Court by other prisoners, and it was in each case adjudicated that the Adult Authority are bound by section 3063 of the California Penal Code, prohibiting the suspension or revocation of paroles without legal cause.

The United States Supreme Court did not call upon respondents to reply; and certiorari was denied without a hearing on February 13, 1967.

Footnotes:

[1] It should be noted that the California Adult Authority have been accused of coercing each prisoner comming before them to plead guilty as a condition to getting a parole or discharge before expiration of the maximum sentence provided by law for the offense which he is imprisoned.

The instent petitioner of course, was convicted by a jury, and after going to San Quentin prison and appearing before the Adult Authority at least 5 times (from 1953 to 1958), petitioner continuously denied guilt. And because petitioner had observed closely and knew of several prisoners with natural life sentences, and several others with sentences of from 5 years to life or less, who had pleaded guilty and been discharged or paroled; when petitioner appeared before the Adult Authority for consideration in 1959, he pleaded guilty in the presenec of the the Adult Authority, and they actually did set petitioner's sentence at 5 years each for the two robbery convictions, but denied parole.

However, when petitioner appeared before the Adult Authority in 1961, and was asked by Mr. Oscar J. Jahnson, where petitioner

would go if released on discharge, and petitioner replied: "To Bakersfield." Mr. Jahnson said: "But that is where you got into this trouble. What are you planning to do there?" Petitioner replied: "I'm going to fight my case."

Mr. James G. Hutton then asked: "Didn't you tell us before that you were guilty of these crimes?" Petitioner said: "No." And it was then and only then that any intention to increase petitioner's prison term was mentioned. Mr. Jahnson said: "You have enough time in, but we've got to be sure that you stay out of trouble, so we are going to consider you for parole." Petitioner said: "I will appreciate that." Mr. Jahnson said: "How much parole do you think would be fair, James?" (Talking to petitioner). Petitioner said: "You set my time at 10 years, and I only have about 8 months left. I will do that." Mr. Jahnson said: "We know we set 10 years in 1959, but that was then. What we want to do now is add some to that and release you on parole. We think you need some supervision on parole." Petitioner said: "Well, Sir, on March 14, 1962, I will have served the 10 years that was given me in January of 1959, and I will be entitled to a discharge then and not a parole. But if you will let me, I will like to go out on parole until then."

It should be noted also that on June 10, 1961, petitioner appeared before the Adult Authority for consideration on a regular yearly schedual for parole consideration, and not for disciplinary action. And furthermore, it should be noted that in June of 1961, petitioner had completed at least 1 year without an infraction of prison rules being filed against him. This has to be so because petitioner was at that time an "honor prisoner" living in San Quentin's West Block, which is an "honor unit" where it is required that every prisoner living therein must have 1 year with absolutely no violations of prison rules. Yet, the Adult Authority rescinded petitioner's 10 year prison sentence. And obviously, the only reason for this action was to coerce petitioner to plead guilty and not challenge his conviction after being released on discharge.

[2] Section 1506 of the California Penal Code provides that no appeal lyes from an order of a superior court denying a petition for Writ of habeas Courpus.

QUESTIONS PRESENTED

1. If the Superior Courts of the State of California were not authorized to impose a sentence in term of years and were required to commit petitioner to the California Adult Authority for "The term prescribed by law", and the Adult Authority were not required by any statutory law to determine and fix a specific duration of imprisonment between the maximum and minimum provided by

law, except at their own will and caprice, can the commitment survive the constitutional test for due process of law under the 14th Amendment to the Constitution of the United States on ground that the sentence is vague and uncertain?

2. If, under California law, when a prisoner is serving two indeterminate sentences of imprisonment to be served consecutively, as the instant petitioner, and the law specifacilly provides that the Board may fix the term and duration of all other consecutive sentences "after the expiration of the first sentence", the prisoner had served 7 years, 9 months and 15 days for two counts of first degree robbery, when the Board fixes the sentences for both counts of robbery at 5 years each, did the term of the first sentence terminate after the first 5 years of imprisonment? Did the additional 2 years, 9 months and 15 days count as time served on the second term? Could the Board re-open the first sentence if it had terminated? Could the Board increase the term of imprisonment for the second consecutive sentence on June 15, 1961, (after 9 years and 4 months of continuous servitude as a result of the 2 robbery convictions?

3. If the Legislature enacted Section 3063 which specifically prohibited the Board to revoke a parole without cause, was it violation to due process of law under the 14th Amendment for it to revoke the whole term for no cause?

• • • • •

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. 47725

Filed August 25, 1967, James P. Welsh, Clerk

JAMES CONWAY, PETITIONER

v.

CALIFORNIA ADULT AUTHORITY, RESPONDENT

ORDER DENYING PETITION WITH LEAVE TO AMEND—
August 24, 1967

Upon reading the affidavit of James Conway, in forma pauperis, IT IS ORDERED that said petitioner be and is hereby allowed to file his petition for writ of habeas corpus, without prepayment of fees.

This petition for writ of habeas corpus fails to comport with established requirements in that an improper party is named as respondent; a brief, concise statement of the pertinent facts is absent; and there is lacking any indication that a copy of petitioner's voluminous 76 page brief has been served upon the California State Attorney General.

Accordingly, these proceedings are hereby dismissed, with leave to amend to correct the hereinabove noted deficiencies.

DATED: AUGUST 24, 1967.

/s/ George B. Harris
United States District Judge

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

[Title Omitted in Printing]

MOTION FOR HEARING—Filed September 8, 1967

TO: THE HONORABLE PRESIDING JUDGE IN THE ABOVE ENTITLED COURT.

James Conway respectfully moves this Honorable Court for a hearing in the instant case without amending the original petition or any part thereof filed in this Honorable Court on August 25, 1967.

JURISDICTION

This motion is made on ground that after reading the petition for writ of habeas corpus and the 76 page supplemental brief, this Court said the following:

> "This petition for writ of habeas corpus fails to compart with the established requirements in that an improper party is named as respondent; a brief concise statement of the pertinent facts is absent; and there is lacking any indication that a copy of petitioner's voluminous 76 page brief has been served upon the California State Attorney General.
>
> "Accordingly, these proceedings are hereby dismissed, with leave to amend to correct the herein above deficiencies."

The jurisdiction of this Court is invoked under sections 1915(a) and 2241(a), (c), (3) of Title 28 U.S.C.A.

STATEMENT OF FACTS

It is conceeded that another party (Raymond L. Procunier) is holding petitioner in a State prison, and even though such detention is on the order of the Adult Authority, any order respecting this detention should preferably be addressed to Raymond L. Procunier rather than to the Adult Authority. This conceeded, petitioner has

filed herewith a companion application to summon Raymond L. Procunier as an additional party respondent.

With respect to the next ground held by the Court that petitioner failed (as required by Rule 8(a) of the Federal Rules of Civil Procedure) to file a brief concise statement, etc., petitioner respectfully contends that the said 76 page brief was only a supplement to explain questions ten and eleven on the required "Federal Form" (which may not have been received by this Court). However, if the "form" was received, the statement therein appear to be sufficiently "short and plain" to satisfy the requirement stated in Rule 8(a) of the Federal Rule of Civil Procedure.

With respect to the next ground held by the Court that there was no indication that a copy of petitioner's voluminous 76 page brief has been served upon the California State Attorney General, petitioner respectfully submitts that the affidavit of service by mail attached to the "Federal Form" intended for this Court was intended to aver that both documents had been served on all parties concerned. However, petitioner will contact the Attorney General immediately to determine whether these documents were received through the mails.

With respect to the last order of the Court that the proceedings are dismissed with leave to amend to correct the hereinabove noted deficiencies, petitioner respectfully submitts that he is a layman and not a lawyer. Petitioner can see no way of shortening the 76 page brief without destroying the contents thereof.

Therefore, petitioner prays that this Court grant a hearing inspite of the remaining deficiencies therein. The Fourth Circuit Court, in a layman's petition, held:

> "Where the layman's paper clearly shows what he is driving at, it is usually in the interest of justice, and may in the long run save time to temper the reading of the papers with a measure of tolerance." See UNITED STATES v. GLASS, 317 F2d 200 at 202; PYLE v. KANSAS, 317 U.S. 213 at 216.

Dated September 4, 1967.

[Jurat Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. 47725

Filed Sep. 27, 1967, James P. Welsh, Clerk

JAMES CONWAY, PETITIONER

vs.

CALIFORNIA ADULT AUTHORITY and
RAYMOND L. PROCUNIER, RESPONDENTS

ORDER DENYING AMENDED PETITION—September 27, 1967

Pursuant to leave of court granted on August 24, 1967, petitioner has filed an amended petition for writ of habeas corpus wherein he attacks the constitutionality of the California Indeterminate Sentence laws and the power of the California Adult Authority to refix his sentence within the maximum provided by law.

As the Circuit Court stated in Collins v. Klinger, 332 F. 2d 54, 58 (9th Cir. 1964), "Since these are not federal questions, they may not be considered in a federal habeas corpus proceeding. . ." (Authorities Omitted)

Accordingly, this application for writ of habeas corpus must be and is hereby DENIED.

DATED: SEPTEMBER 27, 1967.

/s/ G. B. Harris
United States District Judge

9-27-67 Copies mailed petnr & A. G.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

[Title Omitted in Printing]

PETITION FOR CERTIFICATE OF PROBABLE CAUSE—
Filed October 10, 1967

TO: The Honorable Presiding Judge Of The Above Entitled Court.

Comes now, James Conway, the petitioner in the above entitled case, and presents a petition for Certificate of probable cause and consideration under the provisions of Title 28 U.S.C. §§., 2253 and 1915, so that petitioner may proceed to appeal his cause to the Court of Appeals.

The petition for a writ of hsbeas corpus in this case was denied September 27, 1967 (See Civil Number 47725) a copy of that order is attached hereto and made a part hereof, and the order denying the petition is believed to be error.

Petitioner further believes that this cause of action is taken in good faith and is not frivolous—for, petitioner honestly believes that he is being held illegally and in violation of his constitutionally protected rights of due process and equal protection of the laws.

Petitioner believes that the adverse order denying his petition has been based on conflicting circuit court opinions and opinions inconsistant with applicable decisions of the United States Supreme Court.

REASONS RELIED ON FOR GRANTING THE APPEAL

The Circuit Court opinion in COLLINS v. KLINGER, 332 F2d 54, that petitioner's contention that he is being detained in prison under and by virtue of an unconstitutional law, does not state a federal question, is inconsistant with the opinion of the United States Supreme Court in *In re* STANFORD & TOOL CO., 160 U.S. 247, 255-256, in that it does not tell what issues have been laid to rest by the mandate of the Ninth Circuit Court.

If the Circuit Court opinion intends to hold that a contention that the sentence under the indeterminate sentence law is vague and uncertain does not raise a constitutional issue, such contention is contrary to the United States Supreme Court in HILL v. WHAMPLER, 298 U.S. 460, 463 and cases cited there. And, if it intended to hold that a contention based upon the *separation of powers* does not state a federal issue, such would be inconsistant with the order of the Ninth Circuit Court in APPLICATION OF GORDON, 157 F.2d 659; or if the Court intended to hold that an allegation that the penal statute under which petitioner is detained is unconstitutional for other reasons than those above, the opinion would be contrary to the United States Supreme Court in *Ex parte* SIEBOLD, 100 U. S. 371, 376-377.

For reasons that the Circuit Court opinion in COLLINS v. KLINGER, supra., is vague and uncertain, and inconsistant with the United States Supreme Court, petitioner believes be is entitled to a certificate of probable cause to iron out the inconsistancies therein on appeal.

Dated October 5, 1967.

I declare under penalty of perjury that the foregoing is true and correct.

Respectfully submitted,

/s/ James Conway
JAMES CONWAY

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. 47725

JAMES CONWAY, PETITIONER

vs.

CALIFORNIA ADULT AUTHORITY and
RAYMOND L. PROCUNEER, RESPONDENTS

ORDER DENYING PETITION—October 31, 1967

Petitioner's application for writ of habeas corpus was denied by this Court on September 27, 1967. He now presents a petition for certificate of probable cause to appeal under 28 U.S.C. § 2253.

The original petition attacked the constitutionality of the California Indeterminate Sentence laws and the power of the California Adult Authority to refix his sentence within the maximum provided by law. These issues have been consistently held to involve no federal question.

Accordingly, this petition for a certificate of probable cause must be and hereby is DENIED.

DATED: OCTOBER 31, 1967.

GEORGE B. HARRIS
United States District Judge

Collius v. *Klinger, 332 F. 54*
In re Castro, 226 F.2d 214

47725

Received Dec. 14, 1967, Wm. B. Luck, Clerk

JAMES CONWAY
Box No. A-20630
Tamal, California

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

3788

JAMES CONWAY, PETITIONER

vs.

UNITED STATES DISTRICT COURT, RESPONDENT
CALIFORNIA ADULT AUTHORITY, ET AL.,
REAL PARTIES IN INTEREST

AFFIDAVIT OF JAMES CONWAY

STATE OF CALIFORNIA)
) ss.
COUNTY OF MARIN)

I, James Conway, the petitioner above named, being first duly sworn according to law, deposes and says:

That on or about October 31, 1967 the United States District Court for the Northern District of California, granted permission for petitioner to file a petition for writ of habeas corpus therein entitled *James Conway* v. *California Adult Authority, et al.*, No. 47725, in forma pauperis; and denied the same on ground that the issues alleged therein do not consist of federal grounds; that on November 17, 1967, petitioner filed a timely application for appeal to this Court along with the $5.00 filing fee payed for by Woodrow Williams, A-80533 (a fellow prisoner); but the Clerk of the United States District Court below, refused to accept the filing fee, and petitioner

sought to file herein a petition for writ of mandate along with the affidavit and draft of Woodrow Williams authorizing and requesting the Warden of San Quentin Prison to pay the said $5.00 filing fee out of the "Trust Account" of said Woodrow Williams; but the Warden of San Quentin Prison has caused, permitted, or allowed his deputies, agents, servants, and/or officers to refuse to mail the writ of mandate to this Court; that after having had the said petition for writ of mandate and attachments returned to petitioner's cell on December 8, 1967, petitioner was put in "Isolation" and deprived of all of his legal papers, pencils and notes, all because petitioner refused to accept the returned petition for writ of mandate; that upon refusal of petitioner to accept the said returned petition from prison guard ..... DeLEON, said prison guard then and there threw the said petition upon the floor where it was probably later swept up by the prison janators and burned; that petitioner has no way of knowing how long the Warden of San Quentin prison will continue to keep in Isolation, away from his legal writs, papers and notes (especially petitioner's copy of the same mandate and attachments), nor has petitioner any way of knowing whether the Warden will continue to refuse to mail the said mandate to this Honorable Court until until after petitioner's action in the Court below is lost by techniqualities based upon defaults out of petitioner's control.

That the prison authorities have no legal right or authority to deny petitioner the due access of this Court with the said petition for writ of mandate and attachments, because they do not agree with the contents thereof. See *Ex parte Hull*, 312 U.S. 546. And therefore, this Honorable Court should retain jurisdiction of the matters involved herein until the said petition for mandate with attachments be received, considered and determined by this Honorable Court in accordance with *Ex parte Hull*, supra.

THEREFORE, petitioner petitioner prays that this Court shall hold this affidavit as a memorandum to show that the only reason why appeal in *Conway* v. *California Adult Authority*, No. 47725 has not been perfected in

this Court, is that the United States District Court refused to accept the filing fee tendered by petitioner on November 17, 1967; and the prison officials has so far (upon exhibition of this affidavit) refused to allow petitioner to to file a petition for mandate in this Honorable Court.

Dated: December 10, 1967.

I declare under penalty of perjury that the foregoing is true and correct.

Respectfully submitted

/s/ James Conway
JAMES CONWAY

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Misc. 3788

JAMES CONWAY, PETITIONER

vs.

CALIFORNIA ADULT AUTHORITY and RAYMOND L. PROCUNEER, RESPONDENTS

ORDER DENYING APPLICATION FOR CERTIFICATE OF PROBABLE CAUSE

Petitioner has submitted an affidavit to the effect that he has been frustrated in his efforts to appeal from adverse orders of the district court entered on September 27, 1967, denying a petition for a writ of habeas corpus and on October 31, 1967, denying an application for a certificate of probable cause.

Treating the affidavit as an application to me for a certificate of probable cause it is denied for the reasons expressed by Judge Harris in the above orders.

/s/ RICHARD H. CHAMBERS
United States Circuit Judge

Filed Feb. 7, 1968, Wm. B. Luck, Clerk

SUPREME COURT OF THE UNITED STATES

No. 211 Misc., October Term, 1968

JAMES CONWAY, PETITIONER

v.

CALIFORNIA ADULT AUTHORITY, ET AL.

On petition for writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—January 27, 1969

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 974 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE 1969 O—339000

Office-Supreme Court, U.S.
FILED
JUN 27 1969
JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1969

No. [redacted] 40

JAMES CONWAY,

Petitioner,

vs.

CALIFORNIA ADULT AUTHORITY, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

CHARLES STEPHEN RALSTON
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 974

JAMES CONWAY,

Petitioner,

vs.

CALIFORNIA ADULT AUTHORITY, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

Opinions Below

The order of the United States District Court for the Northern District of California denying petitioner's amended petition for writ of habeas corpus is unreported and appears in the Appendix (hereafter cited A.) at page 20. The order of the United States Circuit Judge Richard A. Chambers denying petitioner's application for a certificate of probable cause to appeal the denial of the petition for writ of habeas corpus is also unreported. It appears at A. 27.

Jurisdiction

Jurisdiction of the District Court was conferred by 28 U.S.C. §2254(a)(3). Jurisdiction of the Court of Appeals was sought to be invoked under 28 U.S.C. §§1291 and 2253. The jurisdiction of this Court rests upon 28 U.S.C. §1254(a) since review is sought of the denial of an application for a certificate of probable cause. The judgment of Judge Chambers of the Court of Appeals was entered on February 7, 1968 (A. 27). The petition for writ of certiorari was filed in this Court on May 6, 1968, and was granted on January 27, 1969 (A. 28).

Questions Presented

Petitioner was convicted of two counts of robbery in the first degree in 1961. Under California law he was sentenced to two indeterminate sentences, to be served consecutively, with a minimum term of five years. In 1967 the California Adult Authority, pursuant to California law, set his sentences at two 1-year terms to run concurrently and to terminate on March 14, 1962. In 1961 the Adult Authority, after hearing from petitioner that he wished to clear his name of the crimes of which he was convicted, revoked the two 1-year terms, thus reinstating the two consecutive indeterminate sentences.

1. Was petitioner denied due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States in that the California indeterminate sentence law permits the Adult Authority complete and arbitrary power to revoke and reset sentences for no reason or for an invalid reason?

2. Were petitioner's sentences revoked and reset for a constitutionally invalid reason in violation of his right to due process of law?

3. Does the failure of the California indeterminate sentence law to provide a defendant with any procedural protection, including notice and hearing, before a sentence may be reset violate the due process clause of the Fourteenth Amendment to the Constitution?

4. Did the action of the California Adult Authority in increasing petitioner's sentences after they had been set at two definite 5-year terms and after he had commenced serving both of the terms violate the Fifth and Fourteenth Amendment protection against double jeopardy?

Constitutional and Statutory Provisions Involved

This case involves the Fifth and Fourteenth Amendments to the Constitution of the United States. This case also involves the following provisions of the California Penal Code:

Section 213. Punishment. Robbery is punishable by imprisonment in the state prison as follows:

1. Robbery in the first degree, for not less than five years.

[Omitted from Appendix: As amended Stats. 1923, c. 126, p. 254, § 1.]

Section 671. Life Imprisonment Where No Maximum Term Prescribed. Whenever any person is declared punishable by a court by imprisonment in the state prison for a term not less than any specified number

of years, and no limit to the duration of such improvement as declared, punishment of such offender shall be imprisonment during his natural life subject to the provisions of Part 3 of this Code. (Enacted 1872. As amended Stats. 1951, c. 1674, p. 3839, § 1.)

Section 1168. Sentence to Imprisonment in State Prison; Duration Not to Be Fixed. Every person convicted of a public offense, for which imprisonment in any reformatory or state prison is now prescribed by law shall, unless such convicted person be placed on probation, a new trial granted, or the imposing of sentence suspended, be sentenced to be imprisoned in a state prison, but the court in imposing the sentence shall not fix the term or duration of the period of imprisonment. (Added Stats. 1917, c. 526, p. 965, § 1. As amended Stats. 1927, c. 708, p. 1491, § 1; Stats. 1929, c. 872, p. 1930, § 1; Stats. 1931, c. 483, p. 1061, § 1; Stats. 1933, c. 814, p. 2150, § 1; Stats. 1935, c. 601, p. 1691, § 1; Stats. 1937, c. 340, p. 1055, § 1; Stats. 1941, c. 106, p. 1083, § 13; Stats. 1943, c. 1056, p. 3017, § 1; Stats. 1947, c. 530, p. 1507, § 1.)

Section 1168. Adult Authority to Fix Length of Term. In the case of all persons heretofore or hereafter sentenced under the provisions of Section 1168 of this code, the Adult Authority may determine and

redetermine, after the expiration of six months, from and after the actual commencement of imprisonment, what length of time, if any, such person shall be imprisoned, unless the sentence be sooner terminated by commutation or pardon by the Governor of the State; provided, however, that where the maximum sentence is for five years or less, such determination may be made by the Adult Authority after a period of 90 days. (Added Stats. 1941, c. 106, p. 1110, § 15.[1] As amended Stats. 1953, c. 722, p. 1988, § 1; Stats. 1957, c. 2256, p. 3934, § 54; Stats. 1963, c. 1792, p. 3344, § 1.)

Statement

On March 5, 1962, petitioner was convicted in the Superior Court of Kern County, California, of two counts of first degree robbery in violation of California Penal Code, § 211. Pursuant to Section 1168 of the Penal Code, he was sentenced to the state prison for the "term prescribed by law." The sentences for the convictions were to be served consecutively. (A. 8).

Section 213 of the Penal Code prescribes that robbery in the first degree is punishable by an imprisonment of not less than five years, but prescribes no maximum term. Section 671 of the Penal Code provides that where no maximum term is set then punishment shall be imprisonment during the natural life of the defendant subject to the provisions of part 3 of the Penal Code. Part 3 of the Penal

[1] The statute is given as it read at the times involved in this case. The 1963 amendment eliminated the language providing for waiting periods before determination, viz. "after the expiration of six months from and . . ." and the last clause beginning with "provided . . ."

Code includes § 3020 which vests in the Adult Authority the duty to "determine and redetermine" what length of time a person sentenced under § 1168 shall be in prison. On January 29, 1959, petitioner appeared before the Adult Authority for parole consideration (A. 9).[1] Petitioner had noticed that persons who were serving life sentences and who admitted their guilt before the Parole Board had been discharged or paroled. Therefore, when he appeared before the Authority for consideration in 1959, he, in his own words, "pleaded guilty" (A. 14) to the crimes for which he was convicted in 1952; that is, he stated to the Adult Authority that he was guilty of the crimes. Although parole was denied the Adult Authority did fix petitioner's prison terms at five years on each count of "robbery," to be served consecutively. Under this determination the sentence would end on March 14, 1962.

On June 15, 1961, petitioner appeared before the Adult Authority for another parole consideration. During the conversation petitioner was asked where he planned to go when he was discharged from the prison. Petitioner replied: "To Bakersfield." An Authority board member objected, saying that, "but that is where you got into this trouble. What are you planning to do there?" Petitioner replied: "I'm going to fight my case." Another Authority member asked whether the petitioner had told them that he was guilty of the crimes he was charged with. Petitioner denied that he was guilty. It was only after this conversation that any intention to increase petitioner's prison term was mentioned (A. 9, 14-15).

[1] From 1953 onward, petitioner had appeared before the Adult Authority for parole consideration each year. The parole was denied each time.

Members of the Authority then told petitioner that the Authority was agreeable to releasing him on parole but wanted him on parole for a longer period than the eight months left until March 14, 1962, when his prison term would expire. They asked petitioner to suggest what increase should be made in his sentence to allow for a longer term of parole. Petitioner objected to any increase in his sentence; he told the members of the Authority that he would be willing to serve the eight months remaining on parole, but indicated that rather than having any increase made, he would prefer to serve out the eight months left in prison (A. 151).

Subsequently, the Adult Authority rescinded its action of January 29, 1959, fixing his terms of imprisonment at five years for each conviction, with an aggregate of ten years. No new term was fixed by the Adult Authority. No reason was given for the refixing of the sentences and no notice or hearing was given before the sentences were refixed other than as described above. On May 28, 1961, petitioner was again summoned by the Adult Authority for further parole consideration. Petitioner, however, refused to appear, taking the position that his two 5-year sentences as fixed on January 29, 1959, had expired and he was entitled to be discharged (A. 9-10). He has been in prison since, more than seven additional years.

Petitioner filed applications for writ of habeas corpus in the Superior Court of the State of California and in the California Supreme Court raising substantially the same constitutional challenges to the redetermination of the sentences as are involved in this case. Both applications were denied without hearing (A. 10-11). A petition for writ of certiorari was filed in this Court on December 21, 1961,

to review the California denial of the petition for habeas corpus. This petition was denied on May 16, 1966 (A. 13). On August 31, 1966, petitioner filed a second petition for writ of habeas corpus in the Supreme Court of California, again urging that the Adult Authority rescinded its order of January 29, 1959, for no valid cause. This petition was similarly denied without a hearing (A. 13-14). November 28, 1966, a second petition for writ of certiorari was filed in this Court to review the second denial of habeas corpus by the California Supreme Court. This petition was denied on February 13, 1967.

On August 25, 1967, the present proceeding was begun by filing a petition for writ of habeas corpus in the United States District Court for the Northern District of California. The petition, which was in two parts, raised substantially the same issues that were raised in the state courts (A. 4, 15-16). On August 24, 1967, the petition was denied for technical reasons, with leave to amend. A motion was filed by petitioner on September 8, 1967, which was treated as an amended petition by the district court. This amended petition was denied on the merits without a hearing on September 27, 1967. The ground for denying the amended petition was that no federal questions were involved in petitioner's attack on the constitutionality of California indeterminate law. Subsequently, petitioner filed a petition for a certificate of probable cause with the district court in order to allow him to appeal to the Ninth Circuit (A. 21). The petition for probable cause was denied by the district court on October 31, 1967 (A. 21). On December 14, 1967, petitioner filed with the Court of Appeals for the Ninth Circuit a document entitled "Affidavit" (A. 21-26). Judge Richard A. Chambers treated the affi-

davit as an application for a certificate of probable cause to take an appeal to the Ninth Circuit and denied the application on the merits for the same grounds on which the district court based its denial of the petition for habeas corpus and the application for certificate of probable cause, viz., that no federal question was raised by the challenge to the indeterminate sentence law (A. 27). Subsequently, petitioner filed a petition for writ of certiorari in this Court, which writ was granted on January 27, 1969. In all the proceedings set out above, both in state and federal courts, petitioner acted on his own behalf without benefit of counsel.

Summary of Argument

The California indeterminate sentence law has for constitutional purposes removed the actual sentencing function from the state judge and has vested it in an administrative agency, the Adult Authority. Where, as here, the penal code establishes a fixed minimum but no maximum term of imprisonment only the Adult Authority may make the determination of the actual sentence to be served. Therefore, the Adult Authority imposed the actual sentenced involved here on petitioner.

I.

A.

The sentencing procedure, including the revocation of a sentence once pronounced, is subject to due process. *Townsend v. Burke*, 334 U.S. 736 (1948); *Mempa v. Rhay*, 389 U.S. 128 (1967). Therefore a sentencing authority cannot act arbitrarily or on whim or caprice when it re-

vokes a sentence. This means, at the least, that there must be some valid reason for a revocation.

B.

The only reason for revocation apparent on the record here, the fact that petitioner wished to return to the place of his conviction and establish his innocence, was not constitutionally valid. The right to prove one's innocence is basic to our scheme of justice, and the state cannot force its surrender directly or indirectly. The Adult Authority's revocation of the terms it set because of petitioner's intention to establish his innocence in effect conditioned his gaining of his freedom by a surrender of a substantial right. This was not constitutionally permissible. *Smartt v. Avery*, 370 F.2d 788 (6th Cir. 1967).

C.

No other reason other than that set out above appears for the action of the Adult Authority. If there was some other reason for its action it was a denial of due process not to give petitioner notice of it, an opportunity to be heard, and other constitutional guarantees before the action was taken. *Mempa v. Rhay*, 389 U.S. 128 (1967); *Townsend v. Burke*, 334 U.S. 736 (1948).

II

Independent of the arguments set out above, it was a denial of due process of law and of the right to be free of double jeopardy for the Adult Authority to increase petitioner's sentence after it had set a definite term of imprisonment.

A.

A long line of authority clearly establishes that for a sentencing authority to increase a sentence after it has been begun to be served imposes double punishment in violation of the constitutional guarantee against double jeopardy. *Ex parte Lange*, 85 U.S. 163 (1874); *In re Bonz*, 282 U.S. 304 (1931); *United States v. Sacco*, 367 F.2d 368 (2d Cir. 1966). This is the case even where the original sentence was due to an error, and the increase is within the maximum that could have been imposed.

Petitioner's case falls squarely within this line of authority. His sentence was fixed at a definite term by the sentencing authority. That authority increased it after one sentence had terminated and after he had served all but eight months of his second term.

B.

Petitioner's rights have been denied under the due process clause either because the Fifth Amendment's guarantee against double jeopardy has been incorporated into the Fourteenth Amendment, or because double punishment for one conviction violates basic notions of justice. This Court should rule that the Fourteenth Amendment incorporates the Fifth Amendment's protection against double jeopardy as a fundamental right. *Patton v. North Carolina*, 381 F.2d 636 (4th Cir. 1967). However, even if the Fifth Amendment protection is not incorporated *in toto*, it is clear that due process does include protection against certain aspects of double jeopardy. *Palko v. Connecticut*, 302 U.S. 319 (1937). The right to be free of double punishment is basic to notions of due process, as evidenced by the long and consistent line of cases in this Court and in the circuits so holding.

ARGUMENT

Introduction

The Statutory Scheme of the California Indeterminate Sentence Law

In order to place the constitutional issues involved in this case in the proper perspective, it will be necessary, first, to briefly outline the history and operation of the California indeterminate sentence law, both as set out in the statutes and as interpreted by the California courts.

The California indeterminate sentence law was originally passed in 1917 by adding Section 1168 to the California Penal Code. Cal. Stats. 1917, c. 527, p. 665. The statute removed from the judge in a criminal case the power and duty of fixing the term or duration of imprisonment following conviction. Rather, the judge was only to sentence the defendant to be imprisoned in the state prison for the term established by law. This had the effect of sentencing the defendant to a term of a minimum and maximum depending on what the Penal Code provided for the particular crime involved. It then became the duty of the governing authority of the prison to determine what further length of time, if any, above the minimum term of imprisonment the defendant would be confined, unless the sentence was sooner ended by commutation or pardon by the Governor. The statute provided specifically that the period of the confinement would not exceed the maximum or be less than the minimum term of imprisonment provided by the law. It further provided that it was the duty of the judge and district attorney involved in the prosecution to send to

the state board of prison directors all possible information regarding the career, habits, education, age, etc., of the defendant for the board's use in determining the actual length of time to be served. The statute has been amended on a number of occasions. However, only certain of those amendments are of concern here.

In 1929, Section 1168 was amended by Cal. Stats., c. 874, p. 1930, which specifically provided that after the state board of prison directors, who now had the power to determine the length of sentence, had determined the number of years to be served, "the term of imprisonment so fixed by the state board of prison directors, shall not thereafter be increased or diminished by said board for any reason whatsoever except as in this section provided." *Id.* at 1931. The statute went on to provide a means for calculating credit for good time, which could be earned, and had a specific provision for the forfeiting of good credit if the convict committed an assault or violated prison rules or regulations and for other reasons. The statute specifically provided that forfeitures could be made only by the state board of prison directors "after due proof of the offense and notice to the offender." *Id.* at 1933.

In 1931, in Cal. Stats., c. 483, p. 1053, Section 1168 was again amended. The power to determine the actual length of time to be served was still vested in the state board of prison directors. However, the specific prohibition against increasing or decreasing sentences was removed. Instead, the statute was amended to allow the revocation of a determination of sentence for certain specific reasons. These included infractions of rules and regulations and conduct. However, no revocation and redetermination could be made

except after a hearing.[4] The provisions for redetermining sentences were kept substantially the same for a number of years. In 1937, in Cal. Stats., c. 543, p. 1555, the language was changed to read that the board "may determine and redetermine" the term of sentence after the expiration of the minimum term of sentence provided by law. The provision cited above, however, allowing revocation only in cases where prison rules have been infracted or an escape has occurred and providing procedural protections before such a revocation is ordered, was retained.

The substantial departure from this language came in 1941 with the passage of Cal. Stats., c. 106, p. 1110. The California legislature removed the provisions for determination of sentence from Section 1168 and enacted a new Section 3020, et seq. of the Penal Code. Section 3020 now read that the board "may determine and redetermine" the length of time a person sentenced under Section 1168 of the Code would serve. Omitted were the provisions which

[4] The text of the provision was as follows:

> In case any convicted person undergoing sentence in any of the state prisons commits any infraction of the rules and regulations of the prison board, or escapes while working outside such prison under the surveillance of prison guards, the board of prison directors may revoke any order theretofore made determining the length of time such convicted person shall be imprisoned, and make a new order determining such length of time not exceeding the maximum penalty provided by law for the offense for which he was convicted, unless the sentence be sooner terminated by commutation or pardon by the governor of the state. Such revocation and redetermination shall not be had except upon a hearing upon the question of such infraction or escape and an adjudication by the board that such prisoner was guilty thereof, which adjudication shall be final. At such hearing such prisoner, unless outside the walls of the prison as an escape and fugitive from justice, shall be present and entitled to be heard and may present evidence and witnesses in his behalf. *Id.* at 1054.

specified the basis for revoking a prior determination and which provided procedural protections before such a revocation could take place. In 1949 the California Supreme Court specifically pointed to these omissions and held that as a result there was no longer a right to a hearing or notice before a term of sentence is either set or revoked. Rather, the board (which became the California Adult Authority by an amendment to the Code in 1957) could determine and redetermine the sentence apparently at will as long as the prisoner was in custody. *Ex parte Smith,* 33 Cal.2d 797, 205 P.2d 662 (1949). In 1961 the California Supreme Court modified this rule somewhat by holding that while there was a broad power to redetermine sentences "good cause must in fact exist for the making of such an order." A redetermination could not be based on "mere whim, caprice, or rumor." *In re McClain,* 55 Cal. 2d 78, 87, 9 Cal. Rptr. 824, 357 P.2d 1086 (1960). However, no specific procedural protections were read back into the statute by the holding in *McClain.* Rather, the holding in *Ex parte Smith* that the 1941 amendments removed the notice and hearing requirement and that no new ones were imposed by the Constitution was reaffirmed.

Petitioner was found guilty of two counts of robbery in the first degree (California Penal Code, § 211). Section 1168 of the Penal Code required the judge to sentence merely to the term required by law and not to any fixed term. Penal Code § 213 provides that robbery in the first degree is punishable by imprisonment in a state prison for not less than five years. No maximum is specified in that statute. However, Penal Code § 671 states that where no limit to the duration of imprisonment is declared, the punishment "shall be imprisonment during his natural life

subject to the provisions of Part 3 of this Code." Part 3 of course includes Section 3020, which gives the Adult Authority the power to determine and redetermine the actual sentences.

As early as 1928 the California Supreme Court held that Section 1168, the indeterminate sentence law, " . . . divested the trial court of any discretion in fixing the exact term of imprisonment, and has vested such discretion in the board of prison directors within the limits prescribed by the Penal Code." *People* v. *Ferlin,* 203 Cal. 587, 603, 265 P. 230, 237 (1928). Thus, the only act the judge is empowered to do is to sentence a defendant to the state prison for "the term provided by law." [5]

Where, as here, there is a minimum sentence but no fixed maximum, the effect of the judge's act is to impose a wholly indeterminate sentence with no upper limit. The Adult Authority alone has the power of actually fixing the sentence, which it may do either by sentencing to a term of years or not acting, which results in a life sentence. See *People* v. *Harmon,* 54 Cal.2d 9, 4 Cal. Rptr. 161, 351 P.2d 329 (1960). Thus, the California Supreme Court has recognized that although an indeterminate sentence without a fixed maximum can be regarded as a life sentence for some purposes, the reality is that:

> . . . in the absence of action by the board, an indeterminate sentence *is an indeterminate sentence.* It is neither a life sentence nor a fixed term sentence; it is entitled to recognition as a distinct *species intelligibilis.*

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[5] This assumes, of course, that the court decides on imprisonment rather than probation or suspension of the sentence.

> The fact that for some purposes it has the legal effect of a life sentence does not mean that it must be regarded as the equivalent of a life sentence for all purposes. . . . A defendant against whom such a sentence has been pronounced may or may not be required to spend the entire term of his natural life in prison. *Ex parte Quinn,* 25 Cal.2d 799, 801, 154 P.2d 875, 876 (1945).

See also *People* v. *Kostal,* 159 Cal. App.2d 444, 323 P.2d 1020, 1027 (1958).

It is therefore clear that, at least in a case such as petitioner's where there is a minimum and no maximum sentence, the California indeterminate sentence law has removed from the judge the sentencing function. Rather, the Authority has and exercises the actual sentencing power which would otherwise be exercised by a court. Once petitioner was found guilty of the crimes of which he was charged the court had merely the ministerial function of sending him to the penitentiary. By statute the term was at least five years with the actual length of time to be served in excess of that to be decided by the Adult Authority. Thus, it in truth imposed sentence on him in 1959.

The California Supreme Court has sought to interpret this statutory scheme to avoid the issue of separation of powers by saying that the Adult Authority's determination of the length of time was not part of the imposition of sentence. *In re Sandel,* 64 Cal.2d 412, 50 Cal. Rptr. 462, 412 P.2d 806 (1966). However, the reality for constitutional purposes of the California system has been accurately characterized by Judge Browning of the Ninth Circuit in a concurring opinion in *Sturm* v. *California Adult Authority,*

395 F.2d 446 (9th Cir. 1968). That case, as does this one, involved a conviction for first degree robbery, sentences according to law, and consequently indeterminate sentences with a minimum of five years and a possible maximum of life. Judge Browning said:

> [J]udicial imposition of a life sentence upon appellant is no more than a legislatively mandated device for transferring the sentencing function from the State court to the State administrative agency with a grant of jurisdiction over appellant's person for a period sufficiently long to enable the agency to perform its functions under the State's indeterminate sentencing law. Use of that device cannot be seized upon as a means to validate whatever action the administrative agency might subsequently choose to take, no matter how seriously the appellant might be injured, and without regard to whether the agency's action was arbitrary, basically unfair, or invidiously discriminatory. 395 F.2d at 449.[6]

The constitutional issues raised by petitioner in this case will be discussed in the context of this assessment of the California indeterminate sentencing law. Part I of the argument will assume, for the sake of argument, that under some circumstances the Adult Authority could constitutionally increase a sentence it had fixed. Part II takes the position, on the other hand, that such an action could not be taken under any circumstances consistent with the protection against double jeopardy.

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[6] Judge Browning concurred in the denial of habeas corpus solely on the ground that no showing had been made that the redetermination was arbitrary.

I.

The Revocation of Petitioner's Two 5-Year Sentences Without Proper Cause Denied Him Due Process of Law.

A. The Action of the Adult Authority in Revoking the Sentence It Had Determined Was Subject to the Due Process Clause.

As has been shown, the statute under which the California indeterminate sentencing system functions had the effect of imposing on petitioner two consecutive indeterminate terms of a minimum of five years with the upper limit to be set by the Adult Authority. The absence of a fixed minimum in Penal Code § 213 resulted in a possible maximum of life imprisonment. However, under California law the Adult Authority exercises the actual sentencing power and decides the specific term of years to be served.

The respondent, in his response to the petition for writ of certiorari, has argued, in effect, that the Authority has virtually unlimited power to perform its duty in whatever way it sees fit. It may set and reset sentences as it wishes, apparently subject to no controls or standards. Petitioner urges that this contention be rejected. Rather he contends that the Adult Authority cannot, consistently with the due process clause of the Constitution, be said to have a vague, unreviewable, and unchallengeable power to act arbitrarily and capriciously.

This Court has held that the sentencing process, whether exercised by state or federal authorities, is subject to scrutiny under the due process clause. Thus, *Townsend* v. *Burke,* 334 U.S. 736 (1948), struck down a sentence

imposed by a state judge as a result of a mistaken assessment of the defendant's past criminal record by the judge in the absence of defense counsel. A sentence so grounded was held to be "inconsistent with due process of law" (334 U.S. at 741), even though it was within the maximum that could have been imposed by law. And see *Williams* v. *New York,* 337 U.S. 241, 252 n. 18 (1949).

Just as the initial setting of a sentence must be done consistent with due process, so necessarily must subsequent action with regard to that sentence. This is the case whether such later action be viewed as the setting of a deferred sentence, *Mempa* v. *Rhay,* 389 U.S. 128 (1967); the revocation of probation, *Burns* v. *United States,* 287 U.S. 216 (1932); or the revocation of a conditional pardon by a governor, *Fleenor* v. *Hammond,* 116 F.2d 982 (6th Cir. 1941). And, *cf. Escoe* v. *Zerbst,* 295 U.S. 490 (1935).

The reason for these decisions is clear. The action of the court or agency, here the Adult Authority, is state action. Its effect was to deprive the defendant of liberty. If the action was taken without due process of law, it violated the Fourteenth Amendment. See *Sturm* v. *California Adult Authority,* 395 F.2d 446, 449 (9th Cir. 1968) (concurring opinion of Judge Browning).

Moreover, in the above cases the argument that the act of the sentencing or probating authority was one of grace and hence could not be questioned was specifically rejected. Thus, in *Burns* v. *United States,* this Court held that the question could be raised as to whether there had been an abuse of discretion and said:

> . . . the probationer is entitled to fair treatment, and is not to be made the victim of whim or caprice. 287 U.S. at 223.

And, in *Fleenor* v. *Hammond,* the Sixth Circuit, while acknowledging that a pardon is an act of grace and could be granted subject to certain conditions and revoked if those conditions were broken, held that the power could not be exercised "arbitrarily or upon whim, caprice, or rumor." 116 F.2d at 986.

Thus, the issues presented by this case cannot be dismissed by characterizing the action of the Adult Authority in setting petitioner's terms as an act of grace, or by arguing that petitioner has no "vested right" in the five year terms that were set, or by pointing out that the Authority could have left the sentences stand at life imprisonment to begin with. As Judge Browning stated in his concurrence in *Sturm, supra:*

> Appellant may have no "right" to be imprisoned for less than his whole life; but he is entitled to have the time he must serve determined in a manner consistent with the Constitution. 395 F.2d at 450.

Indeed, the California Supreme Court itself has read into the indeterminate sentence statutes a requirement that the revocation and refixing of a sentence must be based on cause and cannot be based on whim or caprice. See *In re Schoengarth,* 66 Cal.2d 295, 57 Cal. Rptr. 600, 425 P.2d 200 (1967); *In re McClain,* 55 Cal.2d 78, 9 Cal. Rptr. 824, 357 P.2d 1086 (1960). Such a construction was clearly necessary to prevent the statutes being struck down as permitting arbitrary action limited by vague or nonexistent standards.

It follows from this that when the Adult Authority acted and revoked the two 5-year sentences it had previously set, due process required that there be some valid basis for its doing so. Certainly the very heart of due process is a prohibition against arbitrary acts whose effect is a denial of liberty. Again we quote Judge Browning:

> If, for example, appellant had alleged facts from which it appeared that the Adult Authority had increased the time he must actually serve from six to sixty years for a trivial infraction, or for no reason at all, it would surely be no answer to a due process challenge to say that since "all indeterminate sentences are for the maximum," and sixty years is less than life, the Authority's action redetermining the time appellant must actually serve could not be questioned. 395 F.2d at 450.

Only a few examples are necessary to demonstrate that there must be a valid reason for the respondent's revocation of the five-year terms it imposed on petitioner. It cannot be seriously questioned that if the Adult Authority acted in 1961 because petitioner had, since 1959, become a Baptist, a Unitarian, or a Black Muslim, the revocation could be challenged and set aside. Similarly, if it were shown that the Authority imposed far stricter rules of conduct on black or Mexican-American inmates than on whites and that this was the basis for the revocation, petitioner would surely be entitled to be released. Given then the rule that the Authority must not act arbitrarily or whimsically the question becomes whether there was any constitutionally adequate reason for its action here.

B. The Revocation of the Prior Order Setting a Sentence for No Reason or Because Petitioner Wished to Clear His Name Violated Due Process.

Since no response was filed in the lower courts the allegations of the petition for writ of habeas corpus must be taken as true here. Briefly summarized they establish that: (1) Petitioner was, at the time of the revocation, an honor prisoner with no violations of prison rules on his record for at least one year (A. 15). (2) On January 29, 1959, the Adult Authority was apparently fully satisfied with petitioner's prison record and his rehabilitation, and set his terms at the minimum, to expire on March 14, 1962. (3) On June 15, 1961, petitioner was asked what he would do when he was discharged in eight months. He said that he wished to go back to where he was convicted and to prove his innocence (A. 14-15). (4) Then and only then was there any mention of increasing his term. He was asked whether he had not admitted his guilt. Petitioner denied this, and rejected any extension of his term so that he could be on parole for a longer period (A. 15). Although members of the Authority admitted that he had "enough time in" they indicated that they wished to increase his sentence so that he could spend a longer time on parole and be kept "out of trouble," apparently by not being allowed to prove his innocence. (5) Subsequently, without giving notice of any reason or providing any further hearing, the Adult Authority revoked its order setting the two 5-year terms and has not reset any definite terms since.

On the basis of this record one of three conclusions may be drawn. First, the Adult Authority had no reason whatsoever for its action; second, the Authority revoked the 1959 order because petitioner claimed that he was innocent

of the crimes for which he was convicted and wished to clear his name after he was released; or third, the Authority had some reason that does not appear from this record but gave petitioner no notice of the reason and its alleged basis, gave him no opportunity to contest its basis or validity, and did not state the reason when it revoked its order.

For the reasons set out above, if the Adult Authority had no basis whatsoever for its action then it was necessarily arbitrary. Under the cases cited above it cannot stand since such arbitrary action would have been the result of "whim or caprice" (*Burns* v. *United States,* 287 U.S. 216, 223 (1932)), and would violate due process. This part of petitioner's brief will discuss whether the only reason for the revocation that appears on this record—petitioner's desire to clear his name—could be a valid basis for revocation of the 1959 order. The next part will deal with whether a revocation without a stated reason or opportunity to be heard violates due process.

Petitioner urges that his desire to prove his innocence of the crimes of which he was convicted could not constitutionally be the basis for the Authority's action. Therefore, the revocation was without proper cause but rather was arbitrary and capricious, in violation of his rights under the due process clause. The Authority has, by its action, essentially sought to exile him from his former home and to prevent him, evidently for the remainder of his life, from clearing his name.

However, the right to prove oneself innocent of a crime is certainly a fundamental constitutional right inherent in our notions of justice and implicit in our scheme of criminal

law. The presumption of innocence, the right to be tried openly and to confront one's accusers all serve to protect that right prior to trial and attest to its importance. Even after conviction a defendant cannot be forced to surrender that right. Miscarriages of justice have occurred too many times in the past to require an enumeration of examples. Moreover, the consequences of a conviction, particularly of a felony, continue even after final discharge from prison. See *Carafas* v. *LaVallee*, 391 U.S. 234 (1968). Therefore, to penalize a prisoner merely because he wishes to return to his home and the scene of his conviction to establish his innocence, and escape the onerous consequences of being a convicted felon, after he has been discharged conflicts with the most basic notions of liberty and justice.

The California Adult Authority, however, has done precisely this. When petitioner reasserted his innocence and announced his intention to try and clear his name it objected and told him that it wished to extend his term, put him on probation so that it could stop him. The Authority then revoked the terms it had fixed and in effect imposed additional punishment, which now has exceeded seven years, because he wishes to exercise a fundamental right.

Recent cases have struck down state practices which have denied probation or have inflicted additional terms of imprisonment because prisoners have sought to exercise analogous rights. Thus, in *Smartt* v. *Avery*, 370 F.2d 788 (6th Cir. 1967), the Sixth Circuit held unconstitutional a Tennessee prison rule that delayed consideration for parole for any prisoner that unsuccessfully sought review of his conviction by way of federal habeas corpus. The court held that the effect of the rule was to impose an unconstitutional condition on the exercise of a right protected by the

federal Constitution and laws. In *Patton* v. *North Carolina,* 381 F.2d 636 (4th Cir. 1967), the Fourth Circuit held unconstitutional the imposition of what was in effect a longer sentence by a state court on retrial following the vacating of the original conviction on federal habeas corpus. One ground of the decision was that the effect of the longer term was to place a burden on the exercise of a federal right. Similarly, this Court in *Green* v. *United States,* 355 U.S. 184, 193-194 (1957), held that the government could not condition the right to appeal on giving up the right to plead double jeopardy.[7]

The result of the Adult Authority's action in petitioner's case is virtually identical to that in *Smartt* v. *Avery.* There, felons serving sentences as a result of presumably valid convictions were denied parole because they sought to have their convictions reviewed by way of habeas corpus. Here, petitioner wished to vindicate his name by another means after his discharge from prison and after he had fully paid his debt to society. Arguably, the right to prove one's innocence after serving one's sentence is even more fundamental than the right to have a conviction overturned before the sentence has been completed. In *Smartt* it was held that to penalize a prisoner by delaying or denying probation for attempting to invalidate a sentence (which amounted to a denial of either guilt or liability for punishment) violated due process. Here, the same result must be reached since respondent is similarly punishing petitioner for wishing to do no more.

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[7] And cf. *Springer* v. *United States,* 148 F.2d 411 (9th Cir. 1945), *Butler* v. *District of Columbia,* 346 F.2d 798 (D.C. Cir. 1965), which indicate that other conditions placed on probation are invalid.

Finally, this Court held last term that to threaten or impose greater punishment because a defendant insists on his innocence is to deny him basic constitutional rights. *United States* v. *Jackson,* 390 U.S. 570 (1968). In that decision the Court implicitly recognized that the right to maintain and to establish one's innocence is fundamental to any fair system of justice. Under *Jackson* petitioner could not, on conviction, have received a greater punishment because he would not admit guilt at his trial. Therefore, he cannot be punished simply because he will not admit guilt after conviction and because he wishes to exercise his right to clear his name through the only means now open to him.

Here, the State, after fixing a set term and admitting that petitioner had served enough time in prison, and in the face of his good prison record, has punished him solely for that reason. Such an unconscionable and unconstitutional action cannot be allowed to stand.

C. If the Adult Authority Revoked Petitioner's Two Prior Terms for a Reason of Which It Gave Him No Notice and No Opportunity to Be Heard, Petitioner Was Denied Due Process of Law.

Petitioner has shown that if the California indeterminate sentence law were construed to allow the revocation of an order fixing a term of years for no reason, it would be unconstitutional as vesting in the Adult Authority the power to act arbitrarily pursuant to vague or nonexistent standards. Similarly, it has been shown that if the Adult Authority revoked the terms it had set for the only reason apparent on this record it acted for an arbitrary and unconstitutional reason.

It might be contended, however, that there was some other, valid reason for the Adult Authority's action and that therefore the revocation was lawful. Petitioner contends, however, that any such reason, if it existed, was not communicated to him, nor was he given any opportunity to respond to it. In other words, before revocation can occur, notice of the reason for the action must be given and some kind of a hearing be afforded at which he may present his position.

It has been noted above that at one time there were requirements that a notice and hearing had to be given before a sentence could be redetermined and increased. However, the California Supreme Court has held that, even though good cause must exist for a redetermination (*In re Schoengarth,* 66 Cal.2d 295, 57 Cal. Rptr. 600, 425 P.2d 200 (1967)), notice and hearing was not required. The requirements were deleted from the statutes by the 1941 amendments described above and it was held that there is no constitutional mandate that notice and hearing be given. *In re McClain,* 55 Cal.2d 78, 9 Cal. Rptr. 824, 357 P.2d 1086 (1960).

Petitioner urges, however, that notice of a valid reason and a hearing are essential if the decisions of the Adult Authority are to be subject meaningfully to the requirements of due process. It is clear that the Authority cannot revoke a sentence for no reason at all, since such an action would be arbitrary and whimsical. Similarly, it cannot do so for a constitutionally invalid reason, *e.g.,* because of the religion or race of an inmate. It necessarily follows, therefore, that when the Authority does revoke a sentence it must at least grant the minimum protections of

due process, including notice of a valid reason and a hearing. Otherwise, it will be able to cloak arbitrary or wrongful action in a veil of silence. A prisoner faced with an action that would seriously deprive him of his liberty would be unable to show that it was wrongful unless he could find out and contest the ostensible reason.

The importance of notice and a hearing to prevent arbitrary action that would seriously impinge on liberty has been recognized in a variety of contexts. These include deportation proceedings (*Japanese Immigrant Case (Yamataya* v. *Fisher),* 189 U.S. 86; *Wong Yang Sun* v. *McGrath,* 339 U.S. 33, 49-51); the exclusion of a man claiming citizenship (*Chin Yow* v. *United States,* 208 U.S. 8); the discharge of a college professor for invoking the privilege against self-incrimination (*Slochower* v. *Board of Higher Education,* 350 U.S. 551); college disciplinary proceedings (*Dixon* v. *Alabama State Board of Higher Education,* 294 F.2d 150 (5th Cir. 1961)); and bar committee certification proceedings (*Willner* v. *Committee on Character & Fitness,* 373 U.S. 96). And recently this Court has recognized the importance of the requirements of notice and hearing in order to protect against unlawful, arbitrary, or mistaken agency action where the question was what procedural rights were to be afforded a public housing tenant prior to eviction. See *Thorpe* v. *Housing Authority of the City of Durham,* 393 U.S. 268, 283 (1969).

Certainly it cannot be denied that when a sentencing authority sets or revokes a sentence it takes an action that has grave consequences for the person involved. This Court therefore recognized the importance of ensuring that basic due process requirements be met in a sentencing proceeding in *Mempa* v. *Rhay,* 389 U.S. 128 (1967).

Mempa involved a parole revocation or deferred sentence proceeding which resulted in the petitioner being sent to prison under an indeterminate sentence law closely similar to California's. Although the issue in *Mempa* was the right to counsel, its implications with regard to other basic procedural rights in sentencing proceedings are obvious. The decision puts particular emphasis on the role of counsel in assuring that the facts and circumstances on which the sentence to be imposed is based are fully and correctly presented, and relies particularly on *Townsend* v. *Burke,* 334 U.S. 736 (1948). Just as the presence of counsel is essential to ensure that errors, either of fact or of law, are not made, equally or more important is the requirement that a prisoner be given notice of the reason for the proposed action and an opportunity to contest that basis. If the prisoner is not told why his sentence is to be revoked and is not given an opportunity to show why the actions should not take place he must remain subject to wrongful, arbitrary, or mistaken deprivations of his liberty.

Of interest in *Mempa* is the significance placed by this Court on the fact that when, under Washington law, the judge imposes the maximum sentence, he is required, together with the prosecutor, to furnish the Board of Prison Terms and Paroles with information about the circumstances of the crime and the character of the accused for its use in determining the actual sentence to be served. Even though the Board was not bound by the recommendations of the judge and prosecutor this Court found in the fact of its reliance on them a persuasive reason as to why counsel was needed in the proceeding where they were formulated. 389 U.S. at 135. Surely, if such procedural protections are necessary to ensure that the initial deter-

mination of the sentence is fair, it follows that when an agency revokes a sentence already set, it must provide some minimum of due process which must include at least notice and an opportunity to be heard.[8]

Notice of a valid reason, if any existed, was not given petitioner here. Nor was any opportunity to contest such a reason given. The proceeding on June 15, 1961, was not a hearing to revoke his sentence. Its purpose was to consider whether he should be paroled, and petitioner understood it as such. No mention or hint of a revocation occurred until petitioner expressed his desire to clear his name. It has been shown that that could not have been a valid reason for the Authority's action. If it had any other reason, due process, as *Mempa* demonstrates, required that it inform petitioner of it and give him an opportunity to state his case. This could have enabled him to marshal whatever relevant facts he had to enable the Authority to make a reasoned determination of an issue of the greatest moment to him—whether he was to gain his liberty.

II.

The Increase of Petitioner's Sentences Violated His Right Under the Fourteenth Amendment to Be Free of Double Jeopardy.

In Part I of this brief it has been assumed, solely for the sake of argument, that under some circumstances the Adult Authority might have the power to revoke sentences that it has fixed and increase them. In this part, on the other hand, petitioner contends that under well established principles

[8] Cf. *Hyser* v. *Reed*, 318 F.2d 225 (D.C. Cir. 1963).

of law the action of the sentencing authority in increasing the sentence imposed on petitioner in 1959 for whatever reason violated the protection against double jeopardy as it applies to the states by virtue of the due process clause of the Fourteenth Amendment. Here we first will show that petitioner has suffered double jeopardy, and second will discuss why the protection petitioner seeks is encompassed by the Fourteenth Amendment.

A. The Action of the Adult Authority Violated Long Standing Double Jeopardy Principles.

The decisions of this Court interpreting the double jeopardy clause of the Fifth Amendment have long made it clear that the protection it embodies is twofold. First, it protects against a criminal defendant being tried a second time after jeopardy has attached in the first trial. Secondly, it prohibits two punishments being inflicted as a result of one conviction. Thus, in *Ex parte Lange,* 85 U.S. 163 (1874), the trial court imposed two sentences on the petitioner, both a fine and imprisonment, although the applicable statute permitted only that either a fine *or* imprisonment be imposed. The petitioner paid the fine and, shortly after he began to serve the sentence, sought his release. The court then revoked the prior sentence and sentenced the petitioner to the full prison sentence only. This Court reversed, laying down the general rule stated above. It went on to indicate that once a sentence has begun to be served it cannot be augmented without double jeopardy being violated.

In *In re Benz,* 282 U.S. 304 (1931), this Court, although holding that a sentence could be reduced, said, relying on *Lange,* that it could not be augmented once the defendant had begun to serve it. The Court reaffirmed the principle

that the purpose of the double jeopardy clause was to prevent two punishments as much as to prevent two trials. To increase a sentence is to subject a defendant to such double punishment. 282 U.S. at 307. And, in *In re Bradley,* 318 U.S. 50 (1943), this Court again specifically followed *Lange* even though in *Bradley* the fine had not been paid into the treasury of the United States but could have been returned.[9]

The rule against increasing a sentence, validly imposed, after service of it has begun has been virtually universally followed by the circuit courts of appeals. Thus, in *Schultz* v. *United States,* 384 F.2d 374 (5th Cir. 1967), the district court had originally imposed a sentence that was to run concurrently with another. Subsequently, the court revised the sentence so that it would run consecutively with the prior sentence. The Fifth Circuit held that the effect of this order was to increase the second sentence after the defendant had begun to serve it, in violation of the guarantee against double jeopardy.

The rule thus enunciated has been strictly applied even where it is arguable that an error was made when the initial sentence was imposed by the trial judge. In *United States* v. *Sacco,* 367 F.2d 368 (2nd Cir. 1966), the defendant was convicted on two counts, the first permitted a maximum sentence of ten years and the second a maximum of five. However, the trial court sentenced him to five years on the first count and seven years on the second, in

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[9] *Bozza* v. *United States,* 330 U.S. 160 (1947), does not in any way undermine the principle established by *In re Lange* and *In re Benz.* There the judge failed, through inadvertence, to impose the fine and imprisonment specifically mandated by statute. The error was corrected within five hours and the required fine imposed.

excess of that legally permissible. Subsequently, the defendant moved to have the second sentence corrected. However, on the government's cross motion, the court revised the sentence, imposing seven years for the first count, well within the statutory maximum, and five on the second. The Second Circuit reversed, relying on *Lange*, *Benz*, and *Bradley*. The defendant had begun to serve the original five-year sentence imposed on count one; to increase it resulted in inflicting a second punishment, *i.e.*, an additional two years, for the same offense.

Other circuits have followed the same rule. See *Kennedy* v. *United States*, 330 F.2d 26 (9th Cir. 1964) (cannot change concurrent sentences to consecutive ones once they have been begun to be served); *United States* v. *Adams*, 362 F.2d 210 (6th Cir. 1966) (cannot vacate legal sentence, impose a more severe one); *Duggins* v. *United States*, 240 F.2d 479 (6th Cir. 1957); *Patton* v. *North Carolina*, 381 F.2d 636 (4th Cir. 1967); *Exberg* v. *United States*, 167 F.2d 380 (1st Cir. 1948).[10] In these cases the same basic factors were present. (1) The sentencing authority imposed a sentence less than the maximum permissible under statute; (2) the sentence imposed was lawful; (3) the defendant had begun

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[10] Virtually the only court of appeals case contra was *Phillips* v. *Biddle*, 15 F.2d 40 (8th Cir. 1926). But in *Oxman* v. *United States*, 148 F.2d 750, 753, the Eighth Circuit said:

> . . . in criminal cases a sentence "already partly suffered cannot be increased." . . . The reason for the limitation is that to increase the sentence after it has been served in part, subjects the defendant to double punishment for the same offense in violation of the 5th Amendment to the Constitution, which provides that no person shall "be subject for the same offense to be twice put in jeopardy for life or limb." A sentence may be reduced after it has been partly served, but it may not be augmented. *It is not a jurisdictional but a Constitutional question.* (Emphasis added.)

to serve the sentence. In most of the cases it was reasonably clear that the sentencing authority had committed an error, often of an administrative kind. Thus, for example, in *Sacco* it could be reasonably inferred that the judge meant originally to sentence the defendant for seven years on the count which permitted such a term; he probably had no intention to sentence him to seven years on a count that allowed only a five-year maximum.

The rationale and necessity for the rule enunciated in *Lange* and *Benz* and applied by the above courts can be shown by the following example. Assume that a defendant were convicted under a statute which permitted a maximum sentence of ten years. The sentencing authority sentenced him to five years. The defendant served the five years and was discharged. One day after his discharge he was recalled by the sentencing authority, whether a court or another tribunal, and was informed that it was felt that additional time in prison was necessary (perhaps because the defendant had stated, after release, that he wished to clear his name). The judge or authority then sentenced him to an additional two years, well within the maximum that he could have been sentenced in the first instance. Unquestionably such action would do exactly what the double jeopardy clause seeks to prevent—it would punish the defendant twice for the same crime.

It follows that no constitutionally relevant distinction can be drawn between the case so described and one where one day *before* the defendant's discharge from the five-year term the sentencing authority imposed an additional two-year sentence. The effect would be identical; in both instances the defendant would serve two sentences and would receive two punishments, the original five-year term and the

subsequent two-year one. It has been in recognition of the identity of the two cases for double jeopardy purposes that the decisions have enunciated the rule that a valid sentence once imposed and once begun to be served may not constitutionally be increased.

Applying this rule to the present case it can be seen that it clearly governs and that petitioner's rights to be free of double jeopardy have been violated. It has been shown above that for constitutional purposes the Adult Authority exercised the actual sentencing power in petitioner's case, particularly in light of his being convicted of a crime for which no maximum term was fixed by statute. In 1959, when it fixed his sentences at two consecutive five-year terms the Authority did precisely what the trial courts did in all of the cases cited above. It sentenced petitioner to a fixed definite term of years within the statutory maximum allowable.

Further, there is no question that petitioner had commenced to serve both terms at the time the Authority revoked the definite terms and increased his sentences. The first five-year term ended in March 1957. Nevertheless, the Authority purportedly increased a sentence already completed potentially back to life imprisonment. This action clearly inflicted double punishment for one of the two crimes for which petitioner was convicted. Petitioner therefore began to serve the second five-year term in 1957, and had only eight months left to serve when the Adult Authority revoked its prior order and increased the sentence. Petitioner, of course, has so far served over seven years more than the five-year sentence that the Authority first set.

To summarize, just as in the cases cited, the sentencing authority here fixed two definite terms. Petitioner served

all of one and all but eight months of the second. Just as in the above cases, the sentencing authority increased the definite terms set to terms within the maximum authorized by statute. However, unlike even the other cases, the first sentence imposed was not the result of an error, clerical or otherwise. Therefore, under a long established and nearly universally accepted rule of constitutional law, petitioner has been subjected to double punishment for the same convictions in violation of his right to be free of double jeopardy.

B. The Rule Against Double Punishment Applies to Petitioner's Case Through the Due Process Clause of the Fourteenth Amendment.

Decisions of this Court, while not yet holding that the Fifth Amendment's prohibition against double jeopardy applies specifically to the states,[11] have indicated that at least certain aspects of double jeopardy may apply by virtue of the due process clause of the Fourteenth Amendment. Thus, in the leading case of *Palko* v. *Connecticut,* 302 U.S. 319, 328 (1937), the Court suggested that certain kinds of double jeopardy might subject a defendant to "a hardship so acute and shocking that our policy will not endure it," and would "violate those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.'" Cf. also *Bartkus* v. *Illinois,* 359 U.S. 121 (1959); *Brock* v. *North Carolina,* 344 U.S. 424 (1953).

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[11] This brief was prepared prior to any decision by this Court in *Benton* v. *Maryland,* Oct. Term 1968, No. 201, in which the issue of incorporation of the double jeopardy clause into the Fourteenth Amendment has been raised.

Relying on this language two circuit courts in recent years have found that the due process double jeopardy standard has been violated in state cases. Thus, in *Hetenyi* v. *Wilkins,* 348 F.2d 844 (2nd Cir. 1965), the court held that at least the basic core of double jeopardy was incorporated. And, in *Patton* v. *North Carolina,* 381 F.2d 636 (4th Cir. 1967), the Fourth Circuit, in following *Hetenyi,* held that one of the fundamental principles of double jeopardy applicable to the states is the one involved here, viz., the rule against an increase of a sentence after it had begun to be served.

In so holding, *Patton* found particularly persuasive language in *Ex parte Lange, supra,* where this Court held that:

> If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence. 85 U.S. at 168.

The basic and fundamental nature of the right involved here is demonstrated not only by the words of *Lange,* but also by the uniformity with which the rule has been applied by the United States circuit courts. As has been shown above, it has been adopted and enforced in the First, Second, Fourth, Fifth, Sixth, Eighth, and Ninth Circuits over a long period of time. In enforcing the rule those courts have relied not only on the decisions of this Court in *Lange* and *Benz,* but also have pointed out that it has long been a fundamental and necessary component of the principle of double jeopardy.[12]

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[12] For this reason, the rule involved here is far different from some of the technical issues involved in double jeopardy questions, *e.g.,* as to precisely when jeopardy attaches at a trial.

Thus, the overwhelming weight of opinion in the federal courts establishes that the standard of *Palko* has been met as the Fourth Circuit held in *Patton*. The conclusion is inescapable that to permit the increase of a sentence once a defendant has begun to serve a fixed and definite term would indeed violate one of the "fundamental principles of liberty and justice that lie at the base of all our civil and political institutions."

Conclusion

For the foregoing reasons, the judgments below denying a certificate of probable cause and a writ of habeas corpus should be reversed.

Respectfully submitted,

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1969

No. 40

JAMES CONWAY,
Petitioner,

vs.

CALIFORNIA ADULT AUTHORITY, *et al.*,
Respondents.

On Writ of Certiorari to the Honorable Richard H. Chambers, Chief Judge of the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS

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BRIEF FOR RESPONDENTS

OPINIONS BELOW

The order of the United States District Court for the Northern District of California denying petitioner's amended petition for a writ of habeas corpus, which is unreported, appears in the Appendix (hereinafter cited as A.), at 20. The order of Chief Judge Chambers, treating a document filed by petitioner as a petition for certificate of probable cause to appeal the denial of the petition for writ of habeas corpus,

and denying the same, is also unreported, and appears at A. 27.

JURISDICTION

Jurisdiction of the District Court was conferred by 28 U.S.C. section 2241(c)(3). Jurisdiction of the Court of Appeals was sought to be invoked under 28 U.S.C. sections 1291 and 2253. In point of fact, the Court of Appeals was without jurisdiction to take any action in the matter because of the lack of a timely filing of a notice of appeal or its equivalent. The jurisdiction of this Court rests upon 28 U.S.C. section 1651(a), to review, in this case, the denial of an application for a certificate of probable cause. The order of Chief Judge Richard H. Chambers denying the same was entered on February 7, 1968 (A. 27). The petition for writ of certiorari was filed in this Court on May 6, 1968, and was granted on January 27, 1969 (A. 28).

QUESTIONS PRESENTED

1. Did Judge Chambers have jurisdiction to entertain an untimely application for a certificate of probable cause?

2. If so, did he abuse his discretion in denying the certificate?

   A. Does a demonstrably false allegation that a state prisoner's term was refixed without cause or hearing state grounds for relief on habeas corpus?

B. Does the Fifth Amendment protection against double jeopardy bar redetermination of a prison term tentatively fixed under an indeterminate sentence law?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth and Fourteenth Amendments to the Constitution of the United States. This case also involves California Penal Code sections 213, 671, 1168, and 3020, all of which have been set out verbatim on pages 3 through 5 of the Brief for Petitioner, and need not be repeated here.

STATEMENT

Petitioner was convicted in the Superior Court of Kern County, California, on two counts of violating California Penal Code section 211 (first degree robbery). On March 5, 1952, petitioner was sentenced to state prison for the term prescribed by law (see Cal. Pen. Code § 1168), the sentences to run consecutively (A. 8). As petitioner has analyzed in some detail (Brief for Petitioner 5-6), the effect of this sentence was to impose two consecutive sentences of 5 years to life, with discretion in the California Adult Authority to determine whether petitioner would be discharged from custody prior to the expiration of the life terms.

On January 29, 1959, after a hearing, the Adult Authority tentatively fixed petitioner's prison terms at 5 years on each count. Absent further action on the part of the Authority, petitioner's term would have expired on March 14, 1962. Subsequent to June 15, 1961, the Adult Authority, after a hearing, rescinded its prior action fixing petitioner's terms. The effect of this decision was to return petitioner to the status of a life prisoner.

The foregoing facts, as stated in petitioner's petition for habeas corpus in the District Court, are correct. The petition below also contained certain demonstrably false allegations. The petition and its 76-page addendum (only a small portion of which appears in the Appendix) presented the questions of whether the California indeterminate sentence law was unconstitutionally vague, whether California law permitted the refixing of petitioner's term after the first of his consecutive sentences had allegedly expired, and whether his term could be redetermined "for no cause." (A. 15-16). In a footnote (A. 14-15), petitioner made certain factual allegations which his counsel interprets in the Brief for Petitioner substantially as follows: for a year or more prior to his appearance before the Adult Authority in June of 1961, he had had no disciplinary actions for violation of prison rules filed against him. When he told the Authority panel members that he wished to return to the place of his conviction and fight his case, the members of the panel expressed the intention of increasing his term. Petitioner now contends that these

allegations raise the claim that his term was refixed without cause or for an invalid cause, and without notice, hearing, and the opportunity to present evidence.

In point of fact, however, petitioner's term was refixed for engaging in a fight with another prisoner, a violation of prison rules, after a hearing at which he appeared, and of which he was duly notified. Attached herewith, marked "Exhibit A," "Exhibit B," and "Exhibit C," and incorporated herein by reference, are copies of various records of the Adult Authority relating to petitioner's case. Exhibit A is a copy of California Department of Corrections form 263 entitled "Notice of Complaint." Addressed to petitioner, the notice informed him that a written complaint had been filed against him on a charge of violating Director of Corrections Rule D-1201 ("Inmate's Behavior"), informed him of the date on which a hearing would be held, and advised him that the Authority or its disciplinary committee would conduct a hearing to determine his guilt or innocence, and to make, "when applicable," a determination regarding the refixing of his term.[1] Petitioner's receipt of the notice of hearing is acknowledged by his signature. "Exhibit B" is a copy of the charge, plea, findings and disposition, which details the offense and

[1]The form actually refers to three possible actions: revocation of parole, "forfeiture of credits," and refixing of term. Since petitioner was not on parole, and not subject to forfeiture of credits, having been received by the Department of Corrections subsequent to January 1, 1948, see California Penal Code sections 2293 and 2926, but had had his term fixed, only the refixing of term was a possible course of action in his case.

the explanation offered by petitioner. He was found guilty. Refixing of his term followed some six months later.[2]

Unfortunately, the true facts regarding the circumstances under which petitioner's term was refixed were never brought to the attention of the courts below. The district Court denied the petition on its face and without issuing an order to show cause. Consequently, we did not respond to it.[3] For that matter, we have no record of even being served with petitioner's original petition for writ of habeas corpus, and to this date do not have a copy of the same except to the extent that it is printed in the Appendix.

On August 24, 1967, the petition was denied on the ground that it failed to name the proper party as respondent, did not contain a brief, concise statement of the pertinent facts, and did not indicate that a copy of the 76-page addendum had been served upon the Attorney General of California. Leave to

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[2]During the period in question, it was the policy of the Adult Authority, following the imposition of disciplinary action, and upon recommendation of the Disciplinary Committee, to postpone the inmate's next appearance before the Authority to the sixth month following the infraction. This procedure was followed in the instant case. Attached hereto, marked "Exhibit D," and incorporated herein by reference is a copy of an excerpt from the minutes of a meeting of the Adult Authority held on December 29, 1960, ordering the postponement of petitioner's next calendar appearance. The actual rescission of the order fixing petitioner's term took place on July 10, 1961.

[3]Because the vast majority of habeas corpus petitions filed by state prisoners in state and federal courts are frivolous, it is the policy of the Attorney General of California normally to make no response to them, nor even to submit them to an attorney for evaluation, unless the court in which a particular petition is filed makes some sort of request for response, such as by issuing an order to show cause why the writ should not be granted.

amend was granted. (A. 17). Petitioner amended his petition, and the amended petition was denied by the District Court on September 27, 1967. (A. 20). A petition for certificate of probable cause was filed October 10, 1967 (A. 21), and denied by the District Court on October 31, 1967 (A. 23).

The next document filed in any court was one entitled "Affidavit of James Conway," which was dated December 10, 1967, and received by the Clerk of the United States Court of Appeals for the Ninth Circuit on December 14, 1967 (A. 24-26). The affidavit was treated by Chief Judge Chambers of that court as an application to him for a certificate of probable cause, and denied for the reasons expressed by the District Court in its orders, on February 7, 1968 (A. 27).

SUMMARY OF ARGUMENT

Judge Chambers cannot be said to have abused his discretion in denying a certificate of probable cause to appeal from the order denying the petition for writ of habeas corpus, as he had no jurisdiction to entertain the application for such certificate, the same having been untimely filed. Notice of appeal must be filed within thirty days of the entry of the final judgment, except under certain circumstances not pertinent here. This rule applies to habeas corpus cases. Where a certificate of probable cause to appeal denial of a petition for habeas corpus is denied by the District Court, the petitioner's only remedy is to apply

to the Court of Appeals for the issuance of such a certificate. Such an application, in order to be treated as a notice of appeal, must be filed within the time allotted for filing a notice of appeal—in this case, thirty days. The record fails to show that petitioner either filed or attempted to file any document at all with the Court of Appeals during the thirty-day period following the denial by the District Court of his application for certificate of probable cause. Judge Chambers was therefore without jurisdiction to entertain the application.

There was no abuse of discretion in denying the application for certificate of probable cause for the further reason that the original petition for writ of habeas corpus failed to state facts raising a substantial federal question. The factual allegations of the petition to the effect that petitioner's term was refixed for no reason or for an invalid reason, and without notice and a hearing, are false, and their falsity is demonstrated by documentary evidence reprinted in this brief. Petitioner has hypothesized a system under which the California Adult Authority redetermines prison terms without notice and hearing, and may do so arbitrarily or for no constitutionally valid reason. In actuality, the California Adult Authority refixes terms only for good cause and only after notice and hearing. Furthermore, in petitioner's particular case, his term was refixed for a good cause after proper notice and hearing. We have no significant interest in defending a procedural system which does not exist other than in the imagination of petitioner,

or in defending the proposition that clearly fabricated factual contentions fail to state a cause of action. Petitioner is, in effect, asking for an advisory opinion upon a hypothetical set of facts. Just as it is not this Court's function to issue such opinions, it is not our function to participate in a charade in which fabrications are deemed to be true for purposes of considering legal issues having no bearing on reality.

Nonetheless, we welcome the opportunity to reassert the proposition that the United States Constitution does not govern the action of a parole board in determining and redetermining, on a tentative basis, whether a state prisoner will be granted release prior to the expiration of his maximum term under a state indeterminate sentence law. Under California law, all actions fixing prison terms are tentative and may be reconsidered at any time. A fixed term is automatically refixed at maximum upon the suspension or revocation of parole, and may be refixed at other times for cause. Because of the purely tentative nature of an order fixing term, such an order confers on a prisoner no vested right whatever to the term as so fixed. Assuming, *arguendo*, that actual release on parole confers upon a parolee a vested right to liberty which may not be taken away without cause, notice, and hearing, where, as here, no actual release even on parole has taken place, the authorities are uniform to the effect that reconsideration of a tentative decision to enlarge a prisoner at some future date is not subject to procedural requirements under the federal constitution.

Petitioner's claim that the federal constitutional protections against double jeopardy bar redetermination of a term tentatively fixed by a parole board is without merit. Granting that double jeopardy prohibits the increase, after commencement of service, of a judicially fixed sentence intended to be rigid, it has no application to the reconsideration of an administrative decision made some years after a judicial proceeding, and known by all parties to be purely tentative, to release a prisoner from custody after a stated time, should nothing occur prior to the expiration of that time to warrant reconsideration. This Court has recently held that the double jeopardy provisions of the Fifth Amendment, as applied to the states, present no bar to the imposition, upon retrial following reversal or vacation of a conviction, of a greater sentence than that originally pronounced. Such greater sentence need be justified only by objective facts not known at the time of the original sentence imposition, such as the defendant's prison record while serving the original sentence. *A fortiori*, a parole board may redetermine, upon the basis of an inmate's prison record, his sentence, once tentatively fixed.

ARGUMENT

I

JUDGE CHAMBERS LACKED JURISDICTION TO ENTERTAIN THE APPLICATION FOR A CERTIFICATE OF PROBABLE CAUSE, AS NEITHER IT NOR ANY OTHER DOCUMENT WAS FILED IN THE COURT OF APPEALS WITHIN THIRTY DAYS OF THE ORDER OF THE DISTRICT COURT DENYING A CERTIFICATE OF PROBABLE CAUSE.

In exercising its jurisdiction under the all writs statute, 28 U.S.C. section 1651(a), to review the denial by a Court of Appeals or judge thereof of a certificate of probable cause to appeal from an order denying a petition for writ of habeas corpus, the first question which this Court must answer is whether the refusal to issue a certificate of probable cause constituted an abuse of discretion. *House v. Mayo*, 324 U.S. 42 (1945). Obviously, this question must be answered in the negative if the Court of Appeals or a judge thereof lacked jurisdiction to entertain the application for a certificate of probable cause or if, had the certificate issued, the Court of Appeals would have lacked jurisdiction to hear the appeal on its merits. In the instant case, because there was no timely filing of a notice of appeal or equivalent thereof, the jurisdiction of the Court of Appeals to act lapsed prior to the execution and filing of the document treated by Judge Chambers as an application for certificate of probable cause.

With certain exceptions not pertinent here,[1] notice of appeal from a judgment or order must be filed

[1] The exceptions are suits in admiralty, bankruptcy matters, or matters in which the United States or an officer or agency thereof is a party.

within thirty days of its issuance. 28 U.S.C. § 2107. This rule applies to habeas corpus cases, even though the petitioner is not represented by counsel, *Kupsalis v. Wilson,* 380 F.2d 365 (9th Cir.), *cert. denied,* 389 U.S. 878 (1967). A complication in the administration of this rule arises by virtue of the fact that an appeal may not be taken to the Court of Appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a state court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause. 28 U.S.C. § 2253. The courts have been extremely liberal in cases where a habeas corpus applicant is not represented by counsel in accepting informal documents as notices of appeal. *Lawrence v. Wainwright,* 401 F.2d 177 (5th Cir. 1968). Accordingly, it is generally accepted that an application to the District Court for a certificate of probable cause may be made within the thirty-day period, and that if it is made within such period, an order denying the application starts anew the running of the thirty-day period for filing notice of appeal. However, a notice of appeal sent to the District Court will not be filed unless a certificate of probable cause has been issued. Accordingly, where a District Court has denied such a certificate, the petitioner's only remedy is to seek issuance of the same from a circuit justice or judge. We assume, *arguendo,* that if such an application for a certificate of probable cause is made to a circuit justice or judge within the thirty-day period, and granted, the application may be

treated as a notice of appeal which would confer jurisdiction upon the Court of Appeals to hear the appeal.

However, a policy of extreme liberality in treating formal or informal documents as equivalent to a notice of appeal "does not override the requirement that notice of appeal must be filed within 30 days. . . ." *Lawrence v. Wainwright, supra.* Thus, even under the statutory interpretations most liberally favoring the right of appeal on behalf of habeas corpus petitioners, a bedrock requirement of appellate jurisdiction is that either a notice of appeal be filed within thirty days of the issuance of an order by the District Court granting a certificate of probable cause, or that some document evidencing a desire to appeal be filed with the Court of Appeals, a judge thereof, or a circuit justice, within thirty days of the issuance of an order denying a certificate of probable cause. In the instant case, the District Court denied petitioner's amended petition on September 27, 1967, and denied his application for a certificate of probable cause on October 31, 1967. Nothing whatever was filed in the Court of Appeals until December 14, 1967, some forty-four days after the final order of the District Court.[5]

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[5]The document filed on December 14, 1967, entitled "Affidavit of James Conway," contains certain factual allegations which, of course, establish nothing. It was alleged that on November 17, 1967, petitioner filed a notice of appeal with the District Court, together with payment of the filing fee, but that the Clerk of the District Court refused to accept it. It was also alleged that petitioner thereafter sought to file in the Court of Appeals a petition for writ of mandate (A. 24-26). However, the date on which he allegedly sought to file such a petition is not given in the affidavit, there

While 28 U.S.C. section 2107 provides that the time for filing notice of appeal may be extended to 60 days by order of the District Court based upon a showing of excusable neglect because of failure of a party to learn of the entry of the order, in this case there was no such extension, and none was applied for. Nor is there an indication that grounds for such extension existed, for if appellant's affidavit is correct, he did in fact learn of entry of the judgment prior to November 17, 1967, well within the thirty-day period. The document which was filed carries a date of December 10, 1967, or 40 days following the issuance of the District Court's final order. Thus, nothing showing a desire to appeal was filed with the Court of Appeals during the thirty-day statutory period. Therefore, neither Judge Chambers, the entire court, nor a circuit justice had jurisdiction to issue a certificate of probable cause at the time the alleged application therefor was filed. Had a certificate been granted, the appeal would have had to be dismissed when the lack of jurisdiction came to the attention of the court. *Poe v. Gladden*, 287 F.2d 249 (9th Cir. 1961). *Accord, Kapsalis v. Wilson, supra.* Under these circumstances, any certificate of probable cause issued by Judge Chambers or another circuit judge or circuit justice would have been a nullity. Therefore, there can be no claim that Judge Chambers abused his discretion in refusing to issue the certificate.

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being only an indication that it was prior to December 8, 1967. This does not constitute even an allegation that an attempt to file a document with the Court of Appeals was made on or prior to November 30, 1967, the last day for filing a notice of appeal or its equivalent.

It should be noted that the fact that petitioner's opportunity to appeal was lost through lapse of time does not by any means necessarily foreclose the eventual determination by a federal court of the claims he presented to the District Court below. Under 28 U.S.C. section 2244(b), a federal court has discretion to decline to entertain a petition for writ of habeas corpus after a hearing on the merits of an issue of law in a previous application for writ of habeas corpus in federal court resulted in a denial of relief, unless the applicant did not on the earlier petition abuse the writ. However, the District Court does have discretion to entertain the application. In the instant case, if petitioner were to make a subsequent application for a writ of habeas corpus to the District Court alleging the same grounds as he alleged in the instant petition, and if he were to show that he was denied the opportunity to appeal from the denial of the petition in the instant case because of ignorance of the procedures for obtaining a certificate of probable cause from a circuit judge or justice after the denial of same by the District Court, he may very well be able to convince the judge hearing the new application that he should exercise his discretion to entertain it. It is even at least arguable that the judge would be required to conclude that appellant had not "abused the writ" in the instant case, and would therefore be required to entertain the new petition.

II

PETITIONER'S FACTUAL ALLEGATIONS THAT HIS TERM WAS REFIXED WITHOUT CAUSE OR HEARING ARE DEMONSTRABLY FALSE; EVEN IF TRUE, HOWEVER, THEY DO NOT STATE GROUNDS FOR RELIEF.

A. The California Adult Authority refixes terms only for good cause and upon hearing after notice.

Petitioner has very helpfully set out "the statutory scheme of the California indeterminate sentence law," Brief for Petitioner 12-16, in which he points out that the California statutes at first permitted no refixing of a sentence once fixed, were amended to permit refixing of sentences for particular reasons and only after notice and a hearing, and were subsequently amended in 1941 to delete the specific bases for revoking a prior determination of sentence and the requirements of notice and hearing. He calls attention to cases of the California Supreme Court, *In re McLain*, 55 Cal.2d 78, 87, 357 P.2d 1086, 9 Cal.Rptr. 824 (1960) and *Ex parte Smith*, 33 Cal.2d 797, 205 P.2d 662 (1949), holding that while prison terms could not be redetermined without cause, there was neither a constitutional nor statutory requirement of notice and hearing prior to such redetermination.

Petitioner naturally assumes that because the law does not require the California Adult Authority to give notice and hearing prior to redetermination of a prison sentence, the Authority does not do so, and bases his argument on the premise that notice and hearing are constitutionally required procedural requisites to a valid redetermination of term. His factual premise, however, is unsound. The California

Adult Authority has a firm policy of rescinding the fixing of a term, revoking parole, or ordering forfeiture of credits only after a hearing, preceded by notice to the inmate of the charges against him, at which he is allowed personally to appear and to present evidence in his behalf.

Attached herewith, marked "Exhibit E," and incorporated herein by reference is a copy of Adult Authority Resolution No. 216. This resolution sets out a procedure for reporting inmate infractions of prison rules to the Authority for appropriate consideration and action. The reporting of a disciplinary action to the Authority takes place only after the inmate has been given a hearing at which he has pleaded guilty to the charge or been found guilty of the violation. Notice of the hearing and the charges against him are given the inmate by serving upon him a copy of California Department of Corrections form 263.[6] This form is the one used in "Exhibit A" herein. Form 263 also warns the inmate that the hearing may result in a redetermination of his prison term, if the same has been fixed, or revocation of parole or forfeiture of credits, where appropriate. Thus, an inmate charged with an infraction of prison rules is notified of the rule he is charged of violating, the time of the hearing on those charges, and their possible consequences to him. At the hearing, he is given an

[6]California Department of Corrections Administrative Manual, Paragraph 320.05012, provides:

"'CDC' Form 263, NOTICE OF COMPLAINT, will be prepared in duplicate on each case referred to the Disciplinary Committee in accordance with Par. 225.02, Administrative Manual."

opportunity to present evidence in his own behalf. In addition, Resolution No. 216 contains the following paragraph:

> "Normally, the Adult Authority will not take any final Determinative Action rescinding either a parole date or a term fixed unless the respective inmate has been given a personal appearance hearing by a panel of the Adult Authority."

B. Petitioner's term was refixed after he was found guilty of violating prison rules (fighting with another inmate) at a hearing which he attended following notice of which he acknowledged receipt.

Petitioner's entire factual premise—that his term was refixed without notice and hearing and either for no cause or for a constitutionally insufficient cause—is wholly false. "Exhibit A" shows that he was served with, and acknowledged receipt of by his signature, a notice of complaint charging that he

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We do not mean to imply that this resolution governs petitioner's case, for it was adopted in its present form on June 5, 1964, some three years after the date in question. We cite it only to apprise the Court of the present practices of the Adult Authority. Attached hereto, marked "Exhibit F," and incorporated herein by reference as a copy of Adult Authority Resolution No. 216-A, adopted May 11, 1956, and in force as of the date on which the Authority refixed petitioner's term. The language of this resolution is similar to that of the subsequently adopted Resolution No. 216, but it does not state that the Adult Authority normally will not refix a term without giving the inmate a personal appearance hearing by a panel of the Authority. However, it was the policy of the Authority nonetheless to grant such hearings, and furthermore, petitioner does not deny receiving such a hearing by the Authority prior to rescission of its earlier order fixing his term. Moreover, Resolution No. 216-A, in effect at the relevant times in question, provided for a recitation in the minutes of the Adult Authority that the action taken thereon was pursuant to a report of the Disciplinary Committee regarding the inmate's violation of prison rules, as determined by a hearing following notice in the form of service of a written copy of the charge upon the inmate.

had violated Director of Corrections Rule D-1201, governing inmate behavior, informing him of the time and place at which a hearing would be held; and apprising him of possible consequences flowing from such hearing—in this case, the retixing of term. "Exhibit B" shows that he attended the hearing, details the charges of fighting with another inmate, notes that petitioner pleaded not guilty and offered an explanation of his conduct, and notes further that he was found guilty and given a sentence of three days in isolation, with a recommendation that his Adult Authority appearance be postponed to June of 1961. "Exhibit C" is the formal statement of the Disciplinary Committee's recommendations and subsequent Adult Authority action. There can thus be no question but that petitioner was actually afforded all of the procedural requirements—notice, hearing, and retixing of term only for cause—to which he now claims the United States Constitution entitles him.

We realize that in the procedural posture of the instant case, there having been no opportunity below to dispute petitioner's factual contentions, these contentions must technically be taken as true. However, we have brought the falsity of these contentions to the attention of the court in order to point up the fact that we have little or no interest in defending the proposition that his claims, if true, do not state grounds for relief. We do not wish to be placed in the position of attempting to defend procedures of the Adult Authority which exist only in petitioner's imagination. Nor have we significant interest in opposing the proposition that petitioner's factual con-

tentions, if true, state grounds for relief, since the contentions are not true and could have been so proved had we been given the opportunity to oppose the petition below.

The procedures utilized by the California Adult Authority easily withstand the constitutional assaults leveled upon them by petitioner, simply because they actually fulfill his ideas of constitutional requisites. If this Court were to accept as true the fanciful allegations that the California Adult Authority rescinds orders fixing prison terms without cause, notice, or hearing, it would render an advisory opinion as to the constitutionality of a procedural system having no relationship to reality. If we were to accept these contentions as true, for the purpose of aiding this Court in preparing such an advisory opinion, we would be acting out a mere charade. We find utterly pointless a discussion of the constitutional validity of hypothetical procedures.

We can see no point in this Court's passing upon the constitutionality of the procedures which petitioner hypothesizes. This Court could make no constitutional determination of current or past relevance to the law of California. Even if the documentary evidence which we have tendered, and which demonstrates that full procedural guarantees were afforded petitioner, may not for purposes of the instant proceeding be accepted as true or dispositive, his contentions boil down to the factual claim that the proper procedures were not followed in his particular case. This is an individual claim, raised for his benefit

alone, and can have no implications for other California prisoners. Since this Court does not sit for the benefit of particular litigants, *Rice v. Sioux City Cemetery*, 349 U.S. 70 (1955), we suggest that this Court should not consider the arguments raised in Part I of the Brief for Petitioner.

C. Even if petitioner had not been given notice and a hearing, refixing his term would raise no federal question

In support of the District Court and Judge Chambers, we have no hesitation in asserting, and asking this Court to adopt, the broader proposition that the action of the California Adult Authority in refixing a prison term tentatively determined under the California indeterminate sentence law, prior to any release on parole or otherwise, raises no question under the United States Constitution. In so arguing, however, we are obliged to sweep away some of the misconceptions concerning the California indeterminate sentence law which could arise from a reading of the Brief for Petitioner.

Petitioner correctly notes decisions of this Court, particularly *Townsend v. Burke*, 334 U.S. 736 (1948), and *Hyser v. Reed*, 318 U.S. 954 (1943), which hold that due process applies to sentencing. In support of his proposition that due process governs the refixing of terms by the California Adult Authority, he attempts to establish the premise that the Adult Authority, rather than the judge, assumes for certain criminal purposes the actual sentencing function. It is true that when a judge has exercised his discretion to sentence a convicted felon to state prison for the

term prescribed by law, the actual length and conditions of the felon's incarceration are determined, in most cases,[3] by the Adult Authority. However, there reposes a very considerable discretion in the trial judge as to the proper penalty to be meted out to a convicted felon, and the exercise of this discretion constitutes the true sentencing for constitutional purposes.

Of the 34,683 persons convicted of felonies in California superior courts in 1967, all of which were eligible for commitment to the Department of Corrections "for the term prescribed by law," only 5,990, or 17.3 percent, were actually committed to the Department of Corrections. Of the remainder, 58.7 percent were given probation, 12.5 percent were given county jail terms, and 11.5 percent were given other dispositions, including fines, commitments to the California Youth Authority, and civil commitments to the California Rehabilitation Center (for narcotics addicts) and the Department of Mental Hygiene (for mentally disordered sex offenders). State of California, Department of Justice, Division of Law enforcement, Bureau of Criminal Statistics, Crime and Delinquency in California 1967, 145. The foregoing statistics illustrate the breadth of the trial judge's sentencing discretion. The judge may always, at least theoretically, place a convicted felon on probation (though if the conviction is for one of the most serious crimes, he may grant probation only in unusual cases and with the concur-

[3] In some circumstances the sentencing court may recall and resentence a committed felon. Cal. Pen. Code § 1168.

rence of the District Attorney, see Cal. Pen. Code § 1203). Determination of whether a prison sentence is warranted is the true sentencing function. And when this function is exercised, the requirements of due process, of course, apply.

When a convicted felon has been sentenced to state prison "for the term prescribed by law" he has, in effect, been sentenced to prison for the maximum term prescribed by the statute under which he was convicted. The Adult Authority has only two powers: to release the inmate on parole, thereby conferring upon him substantial liberty but nonetheless retaining him in custody, *Jones v. Cunningham*, 371 U.S. 236 (1963); or, by "fixing his term" at less than maximum allowing the termination of even parole supervision at a point in time prior to the expiration of the maximum term. Until and unless the Authority chooses to take one or both of these actions, a prisoner will remain in state prison for the maximum term prescribed by law for the offense of which he was convicted. The Adult Authority has no obligation whatsoever either to grant parole or to fix or refix a prison term. Moreover, when the Authority reduces a maximum sentence, its action, in the very nature of things, is tentative and may be changed for cause. Such procedure presents no federal question. *In re Harris*, supra, 69 Cal.2d at 85, 367 P.2d 1000, 9 Cal. Rptr. 824 (1968). The purely tentative nature of any term fixed at less than maximum means that it is conditioned upon continued good behavior on the part of the inmate, and the absence of any cause for it to

consideration. The Adult Authority has no power to bind itself to the maintenance of a term once fixed, and a term becomes permanently fixed only after its expiration. Until expiration, it confers no vested right whatever upon the inmate.

It is only where a measure of liberty, in the form of parole, has actually been granted and some sort of "right" to its continuance becomes "vested" that the authorities have even hinted at the applicability of due process to the termination of that liberty.

There are federal cases, *e.g., Hyser v. Reed,* 318 F.2d 225 (D.C. Cir. 1963), recognizing the existence of certain procedural rights on the part of federal parolees in connection with the revocation of parole following release, but these rights are recognized as largely, if not entirely, statutory. In addition, some cases, *e.g., Boddie v. Weakley,* 356 F.2d 242 (4th Cir. 1966), have language arguably indicating that procedural rights at parole revocation have constitutional roots. In the instant case, we deal with term refixing. Its closest analog in the federal system is a revocation of parole before release thereon. Distinguishing between pre- and post-release parole revocation, the courts have held that the latter resides within the absolute discretion of the United States Parole Board, which may revoke parole prior to release thereon without notice, hearing, or cause. *See Koptik v. Chappell,* 321 F.2d 388 (D.C. Cir. 1963); *United States ex rel. Mitchell v. Shuttleworth,* 106 F. Supp. 1013 (N.D. Fla. 1952). The same conclusion has, of course, been reached by the federal courts with respect to state

pre-release parole revocations. *See United States ex rel. Foley v. Ragen,* 143 F.2d 774 (7th Cir. 1944); *United States ex rel. Harris v. Ragen,* 81 F. Supp. 608 (N.D. Ill.), *aff'd,* 177 F.2d 303 (1949); *United States ex rel. Lashbrook v. Sullivan,* 55 F. Supp. 548 (E.D. Ill. 1944).[9] *Cf. Escoe v. Zerbst,* 295 U.S. 490 (1935), in which this court stated that there is no constitutional right to notice and hearing at revocation of probation.

And in determining the alleged applicability of due process to the procedure of refixing a prison term prior to its expiration and prior to release on parole, it must be remembered that these procedures have been authoritatively characterized as purely administrative. "The proceedings of the Adult Authority are wholly administrative in nature, and that agency's determination of length or conditions of parole is not a judicial act." *In re Schoengarth,* 66 Cal.2d 295, 304, 425 P.2d 200, 57 Cal. Rptr. 600 (1967). As phrased somewhat more elaborately by a federal court, "The administration of the parole law is the exercise, through the Administrative Department, of the state's power to keep safely, supervise and discipline its prisoners. Such powers are not judicial but are matters of 'prison discipline.'" *United States ex rel. Lashbrook v. Sullivan, supra,* at 550.

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[9]The federal cases arising under Illinois procedures are ostensibly based, at least in part, on the fact that under Illinois law, the parole board is without authority to fix an indeterminate sentence. The California Adult Authority is for all practical purposes in the same position, for, as pointed out earlier, it has no power to make a permanent and binding determination of sentence prior to the actual expiration of a term which it has fixed.

In deciding when, and under what conditions, if any, to release an imprisoned felon, parole boards have the enormous responsibility of exercising a delicate judgment as to the extent of the individual's rehabilitation and the probability of his being a danger neither to himself nor others if allowed into the community at large. Although the California Adult Authority has voluntarily imposed upon itself regulations which provide procedural safeguards to the prisoners concerned, which could possibly interfere with the full exercise of its expert discretion, we suggest that this discretion is too important to be hobbled by procedural gamesmanship. We respectfully submit that under reason and authority, the actions of parole boards in determining whether to change their minds about a tentatively-fixed prison term are not subject to constitutional strictures.

III

THE FIFTH AMENDMENT PROTECTION AGAINST DOUBLE JEOPARDY PRESENTS NO BAR TO THE REFIXING OF A TENTATIVELY-DETERMINED PRISON TERM UNDER THE CALIFORNIA INDETERMINATE SENTENCE LAW.

Petitioner's final contention is that the refixing of his term by the Adult Authority, after it had once been tentatively fixed, was absolutely barred by the jeopardy provisions of the Fifth Amendment, as applied to the states through the Fourteenth Amendment. Since there is no dispute that petitioner's term was indeed refixed, we will meet this argument on its merits.

This contention has been made before, and rejected, most recently and trenchantly by Justice Tobriner of the California Supreme Court in *People v. Dorado*, 62 Cal.2d 338, 360, 398 P.2d 361, 42 Cal. Rptr. 169 (1965);

> "Finally, the action of the Adult Authority in refixing sentences and perhaps increasing their length does not constitute double jeopardy. To support his contrary contention, defendant cites the cases of *United States v. Benz* (1931) 282 U.S. 304 [51 S.Ct. 113, 75 L.Ed. 354], and *Ex parte Lange* (1873) 85 U.S. (18 Wall.) 163 [21 L.Ed. 872], but these cases hold only that a *court of record* may not increase a penalty already imposed without unconstitutionally subjecting the defendant to double jeopardy." [Emphasis in original.]

Granting that double jeopardy forbids a court to increase a sentence once imposed, considered to be permanent, and on which service has begun, it is an utter *non sequitur* to claim that double jeopardy is violated when the Adult Authority reconsiders a tentatively-fixed term and resets it at maximum. Petitioner claims that "the reality for constitutional purposes" of Adult Authority actions, rather than their characterization under state law, is the determinative factor in judging the constitutional validity of the Authority's actions. We fully agree. And "the reality for constitutional purposes" of the Adult Authority's setting and resetting of prison terms is that these actions do not amount to sentencing in any constitutional sense. As explained in more detail *supra*, when

a California judge sentences a convicted felon to prison for the term prescribed by law, the sentence is one for the maximum period of time specified in the statute governing the offense of which the felon was convicted. It remains a sentence for the maximum term until and unless the Adult Authority elects to fix it at a shorter period. By the nature of the law governing the Adult Authority, it has no power to make a permanent determination of sentence. Any determination it makes is necessarily tentative, until and unless the term expires without having been reset. Since only after expiration of the term does the order fixing the term become permanent, only an attempt to refix a term after its expiration could even arguably be barred by the double jeopardy provisions of the Fifth and Fourteenth Amendments.[10]

Equating a tentatively-fixed prison term under an indeterminate sentence law with the kind of judicially fixed sentence imposed by a court would be a pure legal fiction. Moreover, it would fail utterly to take account of the purposes of the indeterminate sentence

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[10]In the instant case, petitioner was given a sentence of five years to life on each of two counts, the sentences to run consecutively. Between five and ten years following the commencement of his sentences, they were each set at five years, to run consecutively. Subsequently, and before the expiration of the sentences, they were both fixed at life. Arguably, the first consecutive sentence had expired prior to rescission of the order fixing term, and petitioner could claim a violation of double jeopardy in its redetermination. However, such a claim would be wholly moot, since the second consecutive, identical, five-year-to-life sentence had not expired at the time of its redetermination, and petitioner is therefore validly confined on at least one life sentence. As a matter of California law, moreover, neither of two consecutive sentences expires until both have expired. 19 Ops. Cal. Atty. Gen. 23 (1952).

law, the first and foremost of which is to facilitate rehabilitation and allow the California Adult Authority to determine and redetermine from time to time the readiness of an individual prisoner to return to society. This system is vastly superior to one in which the judge is obliged, armed with only the information concerning a convicted felon available at and shortly after his trial, to attempt to forecast in how many years the individual will be amenable to release. One of the Adult Authority's tools for the facilitation of rehabilitation is the tentative fixing of a term. When the Authority tentatively fixes a term, it in effect tells the subject prisoner that he will be given his freedom at a certain period of time if he behaves himself in the interim, and if there are no indications that he is not actually fit for release. This purely conditional promise gives the inmate a goal to work toward, and encourages him to conduct himself in a manner demonstrating his readiness to be returned to society. We cannot believe that the Constitution forbids the Adult Authority to make such a tentative promise.

What would be a practical result of a holding that the double jeopardy provisions of the Constitution preclude the Adult Authority's refixing a tentatively-determined prison term? The answer is that, under such a holding, the Adult Authority would decline to fix any prison term at less than maximum until and unless it was certain that the individual involved had at the time of the Authority's consideration of his case, manifested no further need for incarceration or

parole supervision. To fix a term at less than maximum prior to the acquisition of such knowledge by the Adult Authority would be a manifest dereliction of duty on the Authority's part, since it would be forbidden to reconsider its determination, once made, however clear it may become from subsequent events that the initial determination of an individual's term at less than maximum was in error. Prisoners would be deprived of the conditional promise that good behavior would result in their release by a certain date. Morale among prisoners would plummet and the Adult Authority would be deprived of an effective tool to facilitate rehabilitation. In applying double jeopardy to the sentence-redetermination procedures of the Adult Authority under the California indeterminate sentence law, this Court would be conferring a short-term windfall upon prisoners whose terms have already been fixed at less than maximum, at the expense of countless other prisoners who would be deprived of the benefits of a shortened sentence in the future.

The proposition that the double jeopardy clause, insofar as it forbids increase of a sentence already begun to be served, should be strictly limited to judicial increases in sentence is of historical validity and logically sound. It does not offend the intent of the Framers, who did not contemplate the refinements of 20th Century penology. To broaden the scope of double jeopardy, and apply it beyond the realm of judicial increase of sentence, would render unworkable many of the penological improvements of modern

civilization. For example it has been consistently held that the imposition of a sentence even by a judge, following revocation of probation does not constitute double jeopardy. *E.g., United States v. Huggins,* 184 F.2d 866 (7th Cir. 1950). A holding to the contrary would instantly render wholly inoperable any system of probation. There is a precise analogy between the state and federal systems of probation and the operation of the California indeterminate sentence law. When the California Adult Authority tentatively fixes a term, it effectively informs the prisoner whose term is so fixed that he is on probation, and if he maintains good behavior and otherwise does not give cause for his continued incarceration, will be allowed his freedom on a day certain. The Constitution no more prohibits a "revocation" of such "probation" by the Adult Authority than it prohibits a judge from revoking probation and imposing a sentence.

This Court has, of course, recently held that the double jeopardy provisions of the Fifth Amendment are applicable to the states through the Fourteenth Amendment. *Benton v. Maryland,* 89 S. Ct. 2056 (1960). At the same time, the Court held that the double jeopardy clause itself imposes no bar whatever to the imposition, following retrial after a successful attack on a conviction, of a longer sentence than that originally imposed under the first conviction. The Due Process Clause, however, forbids such imposition of a longer sentence without cause, or its punishment for a successful attack on an original conviction, but

does not prevent the imposition of a longer sentence for good cause, including the defendant's prison record established during service of the first sentence. *North Carolina v. Pearce,* 89 S.Ct. 2072, 2079 (1969). We submit that the *Pearce* case itself effectively answers petitioner's contentions. If a court can, upon retrial after successful attack upon a conviction, impose a longer sentence than that originally suffered on the basis of the defendant's prison record, *a fortiori* the California Adult Authority may, on the basis of a prisoner's prison record, reconsider a tentative determination of his term at less than the maximum allowed by law.

CONCLUSION

For the foregoing reasons, we respectfully submit that the order of the District Court denying the petition for a writ of habeas corpus and the order of Chief Judge Chambers declining to issue a certificate of probable cause to review that denial should be affirmed.

Dated, San Francisco, California,
September 5, 1969.

Respectfully submitted,

THOMAS C. LYNCH,
Attorney General of the State of California,

ARLO E. SMITH,
Chief Assistant Attorney General,

GEORGE R. NOCK,
Deputy Attorney General,

Attorneys for Respondents.

(Exhibits Follow)

Exhibit A

Date December 18, 1960

Notice of Complaint To

Conway	A-20630
(Name)	(Number)

1. You are hereby notified that a written complaint has been filed against you. A copy of the complaint is attached hereto or the charge(s) against you listed hereon.

2. A hearing on the charge (s) will be held at Disciplinary Committee Meeting Room Isolation Unit on the 20th day of December 1960, or as soon thereafter as the matter can be heard.

3. At that time, the Adult Authority or its representative committee of prison officials, as provided by the California Penal Code and Adult Authority Resolutions, will conduct a hearing to determine your guilt or innocence, and, when applicable, a determination will be made regarding:

(a) Revocation of parole (Sec. 3060 P.C.)

(b) Forfeiture of credits (Sec. 2923 P.C.)

(c) Refixing of term (Sec. 3020 P.C.)

Charge (s)

D-1201 Inmate's Behavior

(signature illegible)
California Adult Authority
Classification and Parole Representative

I hereby acknowledge receipt of a copy of the com-

plaint specified above or attached hereto and a copy of the foregoing notice of hearing.

Dated December 18, 1960. A-20630

(signature illegible)

(Number) (Name)

Notice to Parole Violators: By virtue of Adult Authority Resolutions when parolees are suspended, terms are refixed at the maximum, and, on commitments received prior to January 1, 1948, credits for the semi-annual period are disallowed.

Exhibit B

Department of Correction
Report of Violation of Institution Rules
San Quentin Prison
(Institution)

To the Warden

I, Officer H. A. Tabash, hereby charge Conway A-20630 with violation of Institution rules and regulations, Inmates Behavior (Fighting) D-1201 on or about Sat. Dec. 17, 1960 2:55 PM, the circumstances of which are as follows: D-1201 Inmates Behavior (Fighting with A-56505 Mathews.)

At approximately 3:00 P.M. Sat. Dec. 17, 1960, the writer observed inmate Conway and inmate Mathews A-56505, grappling with one another in the Main Yard. Inmate Mathews was noticed to be bleeding from his mouth. The writer shouted twice before the inmates heard me, and were broken up by the writer. Inmate Conway made the statement at the scene of the incident, that Mathews had taken his dominoes, and had refused to give them back, and was throwing them into the drain ditch. Inmate Mathews was quiet and cooperative after the incident. Inmate Conway was more concerned about loosing his dominoes and was reluctant to go to the Yard Office, before he could retrieve his dominoes. The dominoes were retrieved and placed in the South Block property room for Conway. Conway was checked at the Hospital and no apparent injuries noted, Mathews was left at the

Hospital for first aid for a cut lip. Both inmates were medically cleared and placed in a holding cell. Subject was informed of the CDC-115

H. A. Tabash (Reporting Employee)
Post .....

Custody Close (illegible)

Plea, Findings and Disposition 12/20/60

Plea: Guilty ..... Not Guilty X Prior Violations 39
Condition of Health App. Good

Findings: Plead not guilty. Claims had Mathews by the arm. Denies striking Mathews. Claims not fighting. Guilty.

Disposition: Found guilty: 3 day isolation

Rx postpone A.A. appearance to 6-61

Approved: Dale B. Frady (Warden-Superintendent)

Action taken by: (illegible), Hocher, (illegible)

Offense: A—D X M— Photos..... Injuries: Inmate.....
.....Employee.....

Estimated Cost of Damage .....

Estimated Cost of Control .....

Exhibit C

Recommendations of Disciplinary Committee and Adult Authority Action

Name: Conway, James Number A20630 (#114-2/61R)

Date Received: 3/14/52

Crime: Robbery 1st 2 counts CS

Previous Actions: 1/29/59 TFA 5 years each on 2 counts CS. Parole Denied. PP to 2/60 calendar

2/4/60 FPC pp 1 year.

Discharge Date: 3/14/62 Parole Date:

Earnings Subject to Forfeiture:

Credits Subject to Forfeiture:

Date of Infraction: 12/17/60

Charge: D1201. Inmates Behavior (Fighting with A 56505-Mathews)
(CDC-115 Attached)

Plea: Not guilty

Findings: Guilty. Claims had Mathews by the arm. Denies striking Mathews. Claims not fighting.

Disciplinary Action: 3 days isolation

Recommendation: Postpone AA appearance to 6/61

Action of Adult Authority:
Place on June 1961 Calendar (Disciplinary 12/17/60)
(illegible) Dec 29, 1960

Exhibit D

State of California
Youth and Adult Corrections Agency
Adult Authority

Meeting of December 29, 1960 held at San Quentin

Excerpt from minutes of meeting held on the above date from official records on file in the office of the Administrative Officer at Sacramento, California:

To Whom It May Concern:

Present were: John G. Bell, Member; James G. Hutton, Adult Authority Hearing Representative; Actions reviewed and concurred in by: Cletus J. Fitzharris, Vice-Chairman.

Order of the Adult Authority Relative to Reports and Recommendations Submitted by Disciplinary Committee or Disciplinary Officers

It Appearing That the following named and numbered inmates having been duly charged with violation of prison rules and regulations, and having been served with written copy thereof and the matter having been referred to the disciplinary committee, established pursuant to Resolution No. 86, as adopted on July 12, 1946, and with reference to Resolution No. 184, (reissued on May 11, 1956) and it appearing that a hearing was held on said charges and the committee having considered each case, finds that the following named and numbered inmates have violated the rules

and regulations of the prison, as set forth in the disciplinary committee's reports which are made a part of the following order of the Adult Authority by reference and the findings herein constitute the reasons therefore in the manner hereinbelow set forth opposite the inmates' respective names:

A-20630	Conway	Infraction—Fighting with A-56505 Mathews—12-17-60. Place on June, 1961 Calendar.

Adopted by the affirmative votes of: John G. Bell, Member; James G. Hutton, Adult Authority Hearing Representative; Actions reviewed and concurred in by: Cletus J. Fitzharris, Vice-Chairman

(Signed) J. R. O'Brien, Classification & Parole Representative

Attest

December 29, 1960

Attest August 25, 1969

/s/ Joseph A. Spangler

Joseph A. Spangler

Exhibit E

Resolution No. 216

Adopted: June 5, 1964

Resolution of the Adult Authority

Subject: *Disciplinary Infractions and Incident Reports*

Whereas, Section 2081.5 of the Penal Code stipulates that the Director of Corrections shall keep complete case records of all prisoners under custody of the department, which records shall be made available to the Adult Authority at such times and in such form as the Adult Authority may prescribe, and

Whereas, Section 2651 of the Penal Code stipulates that any authorization of punishment by the Director of Corrections shall not be construed as a limitation or impairment of the authority of the Adult Authority in exercising its functions, and

Whereas, the Adult Authority feels it is desirable to eliminate all possible inequities in the handling of disciplinary infractions, and to intensify the practice of individualized evaluation of infractions based on the inmate's total record and

Whereas, the foregoing procedures have been reviewed by the Director of Corrections and have received an affirmative recommendation;

Now, Therefore, Be It Resolved: that all Disciplinary Reports and/or Incident Reports involving Adult Male Inmates committed to the Department of Corrections under the provisions of Section 1168 of the

penal code shall be reported to the Adult Authority in a manner and at such times as indicated below:

I. Disciplinary infractions reported on CDC Forms #115 and/or Incident Reports involving an inmate who does not have a parole date and/or whose term has not been fixed at less than the maximum.

A. A report of all disciplinary actions will be presented to the Adult Authority as an integral part of the Adult Authority Pre-Board Report in the manner mutually agreed upon by the Adult Authority and the Director of Corrections.

B. A copy of all Disciplinary Reports and/or Incident Reports pertaining to an inmate which involves any infraction of the Rules and Regulations of the Department of Corrections or any incident which occurred subsequent to his reception on his current commitment, to the last Adult Authority calendar appearance of the inmate, or to his return to prison as a parole violator, whichever was most recent, will be included in the addenda material presented to the Adult Authority during regular calendar appearances.

II. Disciplinary infractions reported on CDC Form #115 and/or Incident Reports involving inmates who are on a credit earning basis, or whose terms have been fixed or refixed at less than the maximum, and/or who have been

granted a parole release date; excepting those disciplinary cases who have been considered by the Disciplinary Committee and found "Not Guilty".

A. Prior to release of the respective inmate on parole, a copy of the Disciplinary Report and/or Incident Report, shall be presented to an Adult Authority Member, or forwarded to the Adult Authority Headquarters in Sacramento in accordance with established procedures to determine whether the inmate may be released on parole or whether the case should be placed on the Special Proceedings Calendar for review by an Adult Authority Panel.

B. The signature of any Adult Authority Member indicating such a Disciplinary Action or Incident Report has been "Noted" will be sufficient authority for the release of the respective inmate on parole in accordance with the existing Determination of the Adult Authority.

C. Whenever a case is placed on the Special Proceedings Calendar, any parole release date will be automatically held in abeyance until a further Determination is made in the case.

D. Disciplinary Reports or Incident Reports involving inmates who have had their terms fixed at less than the maximum with no fur-

ther parole consideration will be referred to an Adult Authority Member, or forwarded to the Adult Authority Headquarters in Sacramento in accordance with established procedures to determine whether the case should be placed on the Special Proceedings Calendar for review by an Adult Authority Panel; provided, however, that no inmate shall be retained in prison beyond his scheduled Discharge Date unless the Determination fixing the term has been amended or rescinded by a panel of two Members of the Adult Authority.

E. Determinations made by individual Adult Authority Members with regard to cases involving either Disciplinary Actions or Incident Reports which are either "Noted" or placed on the Special Proceedings Calendar will not be recorded in the Adult Authority Minutes.

F. In all cases of inmates who are on a credit earning basis and who are found guilty of infractions of the Rules of the Director of Corrections or the Wardens and Superintendents of the California State Prisons by the Disciplinary Committee, the Disciplinary Committee shall include a recommendation as to whether or not credits should be disallowed or forfeited.

G. Institution Staff Members are requested to make any recommendations with regard to

Disciplinary actions they may deem desirable subject to Departmental Policy.

H. Normally, the Adult Authority will not take any final Determinative Action Rescinding either a parole date or a term fix unless the respective inmate has been given a personal appearance hearing by a panel of the Adult Authority.

Be It Further Resolved that the official minute sheets of the Adult Authority (CDC Form 244) shall identify all actions taken by the Adult Authority in conformity with this resolution by inserting the following introductory paragraph:

"Order of the Adult Authority Relative to Reports and Recommendations Submitted by Disciplinary Committee or Disciplinary Officer

It Appearing That The following named and numbered inmates, having been duly charged with violation of prison rules and regulations, and having been served with a written copy thereof, and the matter having been referred to the disciplinary committee established pursuant to Adult Authority Resolution #86, and it appearing that a hearing was held on said charges, and the Committee having considered the case, finds that the following named and numbered inmates have violated the rules and regulations of the prison; the following orders of the Adult Authority are made for the reasons set forth in the disciplinary report referred thereto:"

Be It Further Resolved that Resolution No. 48, adopted January 2, 1945, and Resolution No. 216A, adopted May 11, 1956, are hereby rescinded provided, however, that all actions taken by the Adult Authority pursuant to those resolutions shall remain in full force and effect, unless otherwise abrogated; it being understood that the provisions of the resolution shall take effect upon September 1, 1964.

Adopted by the affirmative votes of:

/s/ Arthur L. Alarcon
Arthur L. Alarcon, Chairman

/s/ John W. Brewer
John W. Brewer, Member

/s/ Abelicio Chavez,
Abelicio Chavez, Member

/s/ Fred R. Dickson
Fred R. Dickson, Vice Chairman

/s/ John G. Bell
John G. Bell, Member

/s/ Harry M. Kamp
Dr. Harry M. Kamp, Member

/s/ William H. Madden
William H. Madden, Member

Attest:
Date: June 8, 1964
Joseph A. Spangler
Administrative Officer

Exhibit F

Resolution No. 216-A
Adopted: May 11, 1956

Resolution of the Adult Authority

Subject: *Record of Disciplinary Infractions and Recommendations of Disciplinary Committee* (Revision)

Be It Resolved, that Resolution No. 216, adopted September 9, 1953, and revised March 3, 1954, be amended in its entirety to read as follows:

Whereas, Section 2081.5 was added to the Penal Code at the 1953 Legislative Session, stipulating that the Director of Corrections shall keep complete case records of all adult male felons committed to the Director, which records shall be made available to the Adult Authority at such times and in such form as the Adult Authority may prescribe, and

Whereas, Section 2651 of the Penal Code was amended at the 1953 Legislative Session, stipulating that any authorization of punishment for disciplinary infractions of inmates by the Director of Corrections shall not be construed as a limitation or impairment of the authority of the Adult Authority in exercising its functions, and

Whereas, Sections 2789, 2921, and 2922 of the Penal Code, relating to the authority of the Adult Authority to increase good time allowance to inmates and placing certain limitations on such authority, were

repealed at the 1953 Legislative Session, effective September 9, 1953;

Now, Therefore, Be It Resolved, that where adult male inmates, who are on a credit-earning basis or who have had terms fixed or refixed or parole release dates granted, are found guilty of infraction of the prison rules by the Disciplinary Committee, the Disciplinary Committee shall submit a report of each such case to the Adult Authority and the report shall contain a recommendation as to whether or not credits should be disallowed or forfeited or the previous action fixing or refixing the term and/or granting parole should be rescinded, as the case may be. Such reports shall be submitted each month as Special Proceedings to the Adult Authority for whatever action the Adult Authority may deem advisable; and

Be It Further Resolved, that where adult male inmates are found guilty of serious infraction of the prison rules by the Disciplinary Committee within six months of their respective hearing dates or next subsequent appearance date before the Adult Authority, such cases shall be reviewed by the Disciplinary Committee and a report shall be submitted to the Adult Authority by the Disciplinary Committee in each case and the report shall contain a recommendation as to whether or not the hearing of the case should be postponed six months or longer from the date of said infraction of the prison rules; and

Be It Further Resolved, that where adult male inmates, who have been granted a discharge date with

no further parole consideration, or who have a parole release date, are charged with any infraction of the prison rules and such charges are *not* referred to or heard by the Disciplinary Committee but are heard by a Disciplinary Officer, the disciplinary report shall be submitted to the Adult Authority as a Special Proceedings, for whatever action the Adult Authority may deem advisable.

Be It Further Resolved, that the official minute sheets of the Adult Authority (CDC Form 244) shall identify all actions taken by the Adult Authority in conformity with this resolution, by inserting therein the following introductory paragraph:

Order of the Adult Authority Relative to Reports and Recommendations Submitted by Disciplinary Committee or Disciplinary Officer

It Appearing That The following named and numbered inmates, having been duly charged with violation of prison rules and regulations, and having been served with a written copy thereof and the matter having been referred to the disciplinary committee, established pursuant to Resolution No. 86, as adopted on July 12, 1946, and with reference to Resolution No. 184, (reissued on May 11, 1956) and it appearing that a hearing was held on said charges and the committee having considered each case, finds that the following named and numbered inmates have violated the prison rules and regulations, as set forth in the disciplinary committee's reports which are made a part of the following orders of the Adult Authority by reference and the findings therein constitute the

reasons therefor in the manner hereinbelow set forth opposite the inmates' respective names:

Be It Further Resolved, that this Resolution shall become effective immediately, and that Resolution No. 216, adopted on September 9, 1953, and amended on March 3, 1954, relating to the same subject matter, shall be and is hereby rescinded;

Be It Further Resolved, that nothing in this Resolution shall abrogate or nullify the provisions of former Resolution No. 216, rescinding Resolutions Nos. 8, 80, 95, 100, and 149, which rescissions, having taken effect on September 9, 1953, are to remain in full force and effect.

Adopted By the affirmative votes of

/s/ Ervis W. Lester
Ervis W. Lester, Chairman

/s/ James D. Tante
James D. Tante, Member

/s/ Fred Finsley
Fred Finsley, Member

/s/ Everette M. Porter
Everette M. Porter, Member

/s/ Clinton T. Duffy
Clinton T. Duffy, Member

/s/ Cletus J. Fitzharris
Cletus J. Fitzharris, Member

Attest:
Date:

Rescinded by # 216 dated 6-5-64

E. A. Burkhart, Executive Secretary

REME COURT, U. S.

Office-Supreme Court, U.S.
FILED
NOV 6 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 40

JAMES CONWAY,
Petitioner,

vs.

CALIFORNIA ADULT AUTHORITY, et al.,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Reply Brief for Petitioner

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IN THE

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Petitioner,

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CALIFORNIA ADULT AUTHORITY, et al.,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Reply Brief for Petitioner

This reply brief will respond to certain issues raised for the respondent for the first time in its brief on the merits.

I.

THE FACTUAL CONTENTIONS MADE BY RESPONDENTS

In their brief respondents seek, for the first time in this case, to dispute the facts set out in the petition for a writ of habeas corpus. They attempt to do this by making general allegations in the brief itself and by seeking to introduce

certain exhibits purporting to show that the Adult Authority revoked petitioner's sentence for good cause and that it has been following constitutionally valid procedures when it revokes or redetermines sentences.

The respondents themselves, however, admit in their brief that for the purposes of this Court's decision the allegations of the habeas corpus petition filed below must be taken as true. *House v. Mayo,* 324 U.S. 42 (1945); *Williams v. Kaiser,* 323 U.S. 471 (1945). The lower courts denied habeas corpus and refused to issue certificates of probable cause because they concluded that as a matter of law the habeas petition on its face failed to state facts that raised a federal constitutional question. It is clear that the facts as alleged were taken as true.

Therefore, the question before this Court is a legal one; if the allegations of petitioner are true, is he being held in violation of the constitution. If this Court answers in the affirmative any dispute as to the facts would be up to the district court to resolve on remand. Unquestionably, this Court does not sit to resolve any such dispute and it could not do so on the present record. Further, it should be pointed out that the exhibits that respondents are now attempting to introduce do not support their position. In their brief they have virtually admitted the central point of petitioner's first argument, i.e., the Adult Authority may not act arbitrarily or capriciously when it revokes a previously determined sentence. But, it is claimed, the Authority revoked the two five-year terms because petitioner got into a scuffle over some dominoes with another inmate. Moreover, as of 1964, constitutionally valid procedures were put into effect. A few comments are in order.

First, respondents' exhibits do *not* reflect that this altercation was the reason for redetermining petitioner's sentences. They only show that discipline (three days in isolation) was imposed and that the matter was placed on the June, 1961, calendar of the Adult Authority. There is no record of any finding or holding that this incident was the basis for refixing the sentences.

Second, even assuming that the procedures set out in the 1964 resolution of the Adult Authority are being followed now, they were simply not in effect as of June, 1961, when the Authority acted in petitioner's case. Moreover, the resolution is itself ambiguous as to whether the procedures there set out are in fact followed in *any* cases. Thus paragraph IIII. (Respondents' Brief, Exhibit E, p. xii) states that:

> *Normally,* the Adult Authority will not take any final Determinative Action Rescinding . . . a term fix unless the respective inmate has been given a personal appearance hearing by a panel of the Adult Authority.

Whether these procedures are followed now and what procedures were applied in petitioner's case are, of course, factual issues which cannot be resolved here; suffice it to say that the petition for habeas corpus puts into issue the adequacy of the procedures afforded petitioner.

Third, the procedures set out in the 1964 resolution are woefully inadequate to meet constitutional standards as set out in *Mempa v. Rhay,* 389 U.S. 128 (1967). As indicated above a term may be refixed without the prisoner's presence. No right to be represented by counsel, to confront accusers, to cross-examine witnesses, or to present evidence on one's own behalf is granted. Nevertheless, the Adult Authority may, and does, exercise its sentencing function by rescinding previously fixed terms without affording a prisoner any of these protections.

Finally, respondents' exhibits serve to illustrate petitioner's main point, i.e., California law gives the Adult Authority sweeping powers to act arbitrarily and to revoke sentences for the most capricious of reasons. The Authority did determine that petitioner should serve only the minimum sentences required by law, two five-year terms. According to the respondents it then resentenced him to life imprisonment because of a minor scuffle over some dominoes.

II.

NORTH CAROLINA V. PEARCE REQUIRES REVERSAL OF THE DECISION BELOW

Respondents in their brief urge that *North Carolina v. Pearce,* 395 U.S. 711 (1969), decided by this Court at the end of last term, requires an affirmance of the decisions below. On the contrary, *Pearce* established that absent unusual circumstances, the guarantee against double jeopardy prohibits the increasing of a fixed sentence. Petitioner urges that in light of *Pearce* the rulings below were erroneous and that at the least they should be reversed and this case remanded for a hearing on the allegations of his petition for writ of habeas corpus.

Pearce squarely ruled that before an increase of a sentence could stand the state had an affirmative duty to show that there was a valid reason for such an increase based on conduct "occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record . . ." 395 U. S. at 726. Here petitioner has alleged that *no* valid reason existed for the refixing of the terms previously set. Moreover, the record before this Court is lacking in any factual data such as contemplated in *Pearce.*

Again, the State of California has chosen to remove the actual sentencing function from the trial judge and to confer it on the Adult Authority. The constitutional protections that this Court has held control the exercise of that function must attach to the proceedings of the Authority. These protections include those enunciated both in *Mempa*, as discussed in petitioner's brief in chief, and in *Pearce* and therefore include the protection against double punishment for the same crime.

III.

THE COURT OF APPEALS BELOW, AND THEREFORE THIS COURT, HAD JURISDICTION OVER PETITIONER'S APPLICATION FOR A CERTIFICATE OF PROBABLE CAUSE

In their brief respondents, for the first time, challenge the jurisdiction of Judge Chambers of the Ninth Circuit, and therefore inferentially that of this Court, to consider petitioner's application for a certificate of probable cause. The decisions cited by respondents do not, however, support the conclusions they draw from them. In those cases the petitioner had apparently made no attempt to comply with the time limitations on applying for certificates from either the district court or the court of appeals. *Kapsalis v. Wilson*, 380 F. 2d 365 (9th Cir. 1967); *Poe v. Gladden*, 287 F. 2d 249 (9th Cir. 1961); *Lawrence v. Wainwright*, 401 F. 2d 177 (5th Cir. 1968).

Here, however, the facts are clearly otherwise. Petitioner filed a timely application for a certificate of probable cause in the district court, a prerequisite for filing a notice of appeal, on October 10, 1967 (A. 21). When this was denied he attempted to file a notice of appeal, which the clerk of the district court refused to accept (A. 24). He then filed an affidavit in the Ninth Circuit which was treated as an application for a certificate of probable cause and denied (A. 27).

Precisely this kind of procedure was held by the Third Circuit to fulfill the requirements for taking an appeal from a denial of habeas corpus. *Fitzsimmons v. Yaeger,* 391 F. 2d 849 (3rd Cir. 1968). In *Fitzsimmons* the court properly focused on the filing, within thirty days, of either a notice of appeal or an equivalent document, such as an application for a certificate of probable cause. Once that had been done, delays in applying to the circuit court for a certificate would not divest the court of its jurisdiction over the appeal. See also, *Mihailoviki v. California,* 364 F. 2d 808 (9th Cir. 1966).

Certainly this enlightened and liberal interpretation of the habeas corpus statutes should apply in the present case. Petitioner not only filed a timely application in the district court, but after it was denied he attempted to file a notice of appeal and papers in the Ninth Circuit. However, according to his affidavit he was thwarted by prison officials who interfered with his sending them out (A. 25). Judge Chambers accepted the allegations of the affidavit and properly treated it as an application for a certificate of probable cause and denied it on the merits. His action should be determinative on the question of the jurisdiction both of the Court of Appeals and of this Court.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 40.—October Term, 1969

James Conway, Petitioner, v. California Adult Authority et al.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[December 8, 1969]

Per Curiam.

The petition for habeas corpus in this case, which was filed in the District Court for the Northern District of California and which was prepared by petitioner *pro se*, attacked the constitutionality of petitioner's confinement in the state prison system pursuant to the California Indeterminate Sentence Law.[1] Petitioner recited that he was convicted in 1952 on two counts of first-degree robbery and was given consecutive sentences of not less than five years each, with no maximum prescribed by law. California law provides that where no maximum term is set, the punishment shall be life imprisonment subject to the power of the California Adult Authority to "determine and redetermine" the length of time that a prisoner shall be required to serve. Cal. Penal Code §§ 671 (West 1955), 1168, 3020 (West 1956).

Petitioner asserted that in June 1961 he appeared before the Adult Authority for parole consideration, as he had done on a yearly basis during his confinement. According to petitioner, during that appearance the members of the Authority evinced an intention to extend his term beyond March 1962, the date that had been tentatively set for his discharge, solely because petitioner

[1] See Cal. Penal Code § 1168 (West 1956) and provisions there listed.

refused to admit his guilt.[2] Shortly after the appearance, the Adult Authority rescinded its earlier action scheduling petitioner for release in 1962; no new date for release was fixed, and petitioner has remained in custody continuously since that time.

The petition for habeas corpus stated flatly that the appearance before the Authority in June 1961 was for routine parole consideration; petitioner claimed that he had been free from infractions of prison rules for at least a year prior to the appearance. He further declared that he was given no reason for the redetermination of his sentence, and received no notice or hearing concerning any possible basis for such action. In conclusion, petitioner stated that, "obviously, the only reason for this action was to coerce petitioner to plead guilty and not challenge his conviction after being released on discharge."

The State filed no response to the petition in the District Court. That court denied the writ without a hearing, in a brief order stating that no federal questions had been presented. The Court of Appeals for the Ninth Circuit denied a certificate of probable cause to appeal for the reasons expressed by the District Court, and petitioner applied to this Court for a writ of certiorari. On the facts recited by petitioner, we granted certiorari to consider his contention that his privilege against compulsory self-incrimination had been infringed by the prison authorities. 393 U. S. 1062 (1969).

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[2] Petitioner claimed that his discussion with the members of the Authority had turned to what he planned to do if released. When petitioner stated that he expected to go "to Bakersfield," one member responded: "But that is where you got into this trouble. What are you planning to do there?" Petitioner declared, "I'm going to fight my case," prompting the member to ask whether petitioner had not admitted to the Authority, two years earlier, that he was guilty. After petitioner denied the previous admission, the members raised—assertedly for the first time—the possibility of extending petitioner's term.

In its brief on the merits, the State has brought to our attention a series of prison documents, whose accuracy has in no way been drawn in question by petitioner, that cast petitioner's detention in a light wholly different from that shed by his petition for certiorari. These documents show that in December 1960 Conway was served with a notice charging him with violation of prison rules and informing him that the violation might result in a refixing of his prison term; he attended a hearing at which he was found guilty of fighting with another prisoner and was sentenced to three days in isolation, with a recommendation that his Adult Authority appearance be postponed until June 1961. Following that appearance, as petitioner notes, the Authority rescinded its earlier action fixing a determinate sentence, thereby reinstating by operation of law his initial indeterminate sentence. Thus, it now appears the State has documentary evidence that the actual facts simply do not present the issue for which certiorari was granted by us.

That this imposition on this Court has been revealed only at this late stage seems to have been the result of the policy of the Attorney General of California, as explained in the State's brief, to make no response to habeas corpus petitions of state prisoners unless the court in which a petition is filed requests a response, as for example, so the State says, by issuing an order to show cause why the writ should not be granted. Since no response eventuated in this instance and the State also failed to flush the problem at the certiorari stage,[2] both this Court and the attorney appointed by the Court to represent petitioner here have unwittingly been placed in

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[2] In response to the petition for certiorari the State merely locked horns with the allegations of the petition as filed, without drawing the Court's attention to the actual facts as subsequently revealed in its brief on the merits.

the unfortunate posture of addressing a situation that does not exist.

In this state of affairs we decline to adjudicate this case. Were we to pass upon the purely artificial and hypothetical issue tendered by the petition for certiorari we would not only in effect be rendering an advisory opinion but also lending ourselves to an unjustifiable intrusion upon the time of this Court. Accordingly, the writ of certiorari is dismissed an improvidently granted.

It is so ordered.